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In the Supreme Court of the United States

OCTOBER TERM, 1995

JACK RANDELL,
PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction to enjoin collection of a tax where no notice of deficiency was issued to the taxpayer.

A. Whether a tax may be assessed upon an individual partner based upon gain arising from partnership transactions that the Internal Revenue Service determined to be "sham transactions" where the taxpayer-partner never claimed any deduction, credit or other tax benefit from his interest in the partnerships.

B. Whether the Internal Revenue Service may single out one partner from two partnerships that have a total of 288 partners and assess a tax only upon that one partner, and upon no other partners, based upon that partner's distributive share of gain from sham partnership transactions.

2. Whether the Court of Appeals erroneously affirmed the decision of the District Court granting summary judgment to the Government without affording Randell any discovery to prove his contention that he was not a partner and without receiving any evidence concerning Randell's contention that the assessment against him was the only assessment upon any partner to be based on a distributive share of sham partnership gains.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Jack Randell respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. *infra*, 1a.) is reported at 64 F.3d 101 (1995). The District Court issued three opinions, which are not officially reported. (App. *infra*, 20a, 36a, 47a.) The unofficial reports of the District Court's opinions are 74 A.F.T.R.2d para. 94-5348, 74 A.F.T.R.2d para. 94-6112, and 94-2 U.S.T.C. para. 50,362.

JURISDICTION

The judgment of the Court of Appeals was entered August 28, 1995. (App. *infra,* 18a.) A timely petition for rehearing was filed October 13, 1995, and denied February 26, 1996. (App. *infra,* 51a.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

AUTHORITIES INVOLVED

Internal Revenue Code (26 U.S.C.)
Section 6212. NOTICE OF DEFICIENCY.

(a) IN GENERAL — If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Section 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT — Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in Section 6212 is mailed (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may

be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction to enjoin any action or proceeding under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.

Section 6221. TAX TREATMENT DETERMINED AT PARTNERSHIP LEVEL.

Except as otherwise provided in this subchapter, the tax treatment of any partnership item shall be determined at the partnership level.

Section 6226. JUDICIAL REVIEW OF FINAL PARTNERSHIP ADMINISTRATIVE ADJUSTMENTS

(a) PETITION BY TAX MATTERS PARTNER — Within 90 days after the day on which a notice of a final partnership administrative adjustment is mailed to the tax matters partner, the tax matters partner may file a petition for a readjustment of the partnership items for such taxable year with —

(1) the Tax Court,

(2) the district court of the United States for the district in which the partnership's principal place of business is located, or

(3) the Claims Court.

(b) PETITIONS BY PARTNERS OTHER THAN TAX MATTERS PARTNER -

(1) IN GENERAL — If the tax matters partner does not file a readjustment petition under subsection (a) with respect to any final partnership administrative adjustment, any notice partner (and any 5 percent group) may, within 60 days after the close of the 90-day period set forth in subsection (a), file a petition for a readjustment of the partnership items for the taxable year involved with any of the courts described in subsection (a).

* * *

Section 6230. ADDITIONAL ADMINISTRATIVE PROVISIONS.

(a) COORDINATION WITH DEFICIENCY PROCEEDINGS. —

(1) IN GENERAL. — Except as provided in paragraph (2), subchapter B of this chapter shall not apply to the assessment or collection of any computational adjustment.

(2) DEFICIENCY PROCEEDINGS TO APPLY IN CERTAIN CASES. —

(A) Subchapter B shall apply to any deficiency attributable to —

(i) affected items which require partner level determinations, or

(ii) items which have become nonpartnership items (other than by reason of section 6321(b)(1)(C) and are described in section 6231((e)(1)(B).)

Section 6231. DEFINITIONS AND SPECIAL RULES.

(a) DEFINITIONS. — For purposes of this subchapter—

* * *

(6) COMPUTATIONAL ADJUSTMENT. — The term "computational adjustment" means the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item.

* * *

Section 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) TAX. — Except as provided in section 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a), and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

STATEMENT

The Internal Revenue Service ("I.R.S.") audited two partnerships, Conarbco and Government Arbitrage Trading Co. ("GAT") in which Randell was a limited partner.[1] In Final Partnership Administrative Adjustments ("FPAA's")

[1]The I.R.S. based its determination that Randell was a limited partner on the fact that he was listed on Schedules K-1 that were prepared by GAT and Conarbco as part of their Partnership Returns (Forms 1065). Randell maintained that he had resigned from Conarbco and GAT. The courts below disregarded Randell's assertion because his affidavit to the District Court regarding his resignation was held to be untimely as it was not filed in his original opposition to the government's motion for summary judgment.

sent to the partnerships, the I.R.S. made the following determinations:

> (a) "It is determined that the losses, *gains* and/or interest expense claimed by you in 1983 [1985, 1986, 1987] with respect to your T-bill, repurchase agreement, reverse repurchase agreement, and other similar transactions *cannot be recognized* because Government Arbitrage Trading Co. [Conarbco] has *not established that the* losses, *gains,* and/or interest expenses *in fact occurred* ... ."
>
> (b) "It is further determined that the T-bill, repurchase agreement, reverse repurchase agreement, and other similar transactions, were not bona fide economic transactions, but rather were pre-arranged, manipulated, fixed, rigged, or risk-free transactions that generated *artificial* tax losses, *gains,* and/or interest expenses, and were either shams or lack the substance necessary for recognition for Federal income tax purposes. Additionally, *no genuine* losses, *gains,* and/or interest expense *occurred* or was incurred."

(App. *infra,* 52a-55a.) (Emphasis added.)

The I.R.S. also provided "alternate positions" that were clearly identified as such. However, the explanations quoted above were not the alternate ones. (*Id.*)

Thereafter, the I.R.S. assessed more than four million dollars in taxes and interest against Randell. (App. *infra,* 23a-25a.) At first, the assessments were based on supposed disallowances of Randell's distributive share of the partnerships' deductions. However, Randell never claimed a share of partnership deductions for Conarbco or GAT. Accordingly, there were no deductions to disallow as to Randell.

After Randell filed an action in the District Court to enjoin collection, the I.R.S. changed its theory for the assessments against him; rather than impose assessments upon him based upon disallowing deductions that the I.R.S. admitted that he never claimed, the I.R.S. stated that it had assessed Randell based upon his share of the GAT and Conarbco partnership gains. However, the I.R.S. had determined that those gains were from sham transactions and could not be recognized for federal income tax purposes. (App. *infra,* 52-55a.)

Moreover, Randell is the only limited partner in GAT or Conarbco who was assessed a tax based upon a distributive share of partnership gains. Conarbco and GAT had a total of 288 limited partners, including Randell. Evidence submitted by the Government to the Court of Appeals panel after oral argument, which was not available in the District Court, indicates that the Government had *no evidence* to rebut Randell's contention that he was the only partner who was assessed a tax based upon a distributive share of "gains" from partnership transactions. (App. *infra,* 65a-68a.)

Proceedings in the District Court

The assessments against Randell were made without notices of deficiency. (See 26 U.S.C. 6212(a).) After failing to win relief on the administrative level based on the I.R.S.' failure to issue notices of deficiency, Randell filed an action in the District Court seeking an injunction against collection pursuant to 26 U.S.C. 6213(a) and 7421(a). Before any discovery was conducted, the Government filed a motion for summary judgment and Randell then filed a cross-motion for summary judgment. After the Court issued its decision of April 27, 1994, which it later vacated, and prior to its June 30 decision, Randell filed an affidavit stating that he had resigned from the partnerships. He requested discovery to enable him to prove this contention, but none was permitted.

The District Court issued three opinions on the parties' cross-motions for summary judgment. On April 27, 1994, the District Court partially granted the Government's motion and denied Randell's motion as to the assessment of so much of the deficiency as pertained to disallowed partnership expenses. The District Court denied both parties' cross-motions as to gains reported on the partnerships' Schedules K-1 issued to Randell. (App. *infra*, 35a.)

On June 30, 1994, the District Court granted the Government's motion for summary judgment regarding the gains for 1985 and 1986 and granted Randell's motion for summary judgment as to 1983 and 1987. (App. *infra*, *45a-46a*)

On August 2, 1994, the District Court granted the Government's motion in full and denied Randell's motion in full. (App. *infra*, 49a.) the District Court did not reach the merits. It ruled that it lacked jurisdiction to hear Randell under 26 U.S.C. 6213(a) and 7421(a) because a notice of deficiency was not required since the assessments were based on "computational adjustments." (App. *infra*, 45a.)

Proceedings in the Court of Appeals

Randell appealed. Among other arguments, Randell argued that the partnership income was determined to be sham and non-recognizable for federal income tax purposes. Therefore, there was no partnership income that could be taxed to him pursuant to 26 U.S.C. 6221.

Randell also argued that the District Court did have jurisdiction under 26 U.S.C. 6213(a) and 7421(a) because the assessments against him were not "computational adjustments," as defined by the Internal Revenue Code. Therefore, notices of deficiency were required. Randell argued that the assessments against him were not "computational adjustments," as that phrase is defined in

26 U.S.C. 6231(a)(6), because they did not "properly reflect the treatment of partnership items." In the treatment of partnership items, the I.R.S. determined that the partnership gain was sham and that no gain occurred.

Randell also argued that the assessments against him did not "properly reflect the treatment of partnership items" because he was singled out for disparate treatment from the treatment accorded all of the other 287 limited partners in GAT and Conarbco. Randell was the only limited partner who was assessed a tax based on the gains from the (sham) partnership transactions. The Government denied that Randell was singled out, but offered no evidence in the motion for summary judgment in support of its denial.

Following oral argument in the Court of Appeals, the panel requested that the Government provide "evidence as to whether Mr. Randell was singled out as the only partner who was taxed upon his share of gross partnership gains." (App. *infra*, 56a.)

In response, the Government initially submitted the Affidavit of Karen Montpetit, dated April 30, 1995. Ms. Montpetit stated that 43 partners in GAT and Conarbco were assessed with *"their full distributive share of partnership income."* (App. *infra*, 60a.) (Emphasis added.)

Thereafter, the government withdrew this statement. On August 21, 1995, the Government submitted the Affidavit of Karen Montpetit dated August 17, 1995. In the latter affidavit, Ms. Montpetit admitted that her April 30 Affidavit was incorrect. She stated that only eight partners in GAT and Conarbco "were assessed pursuant to an FPAA." (App. *infra*, 68a, Montpetit Aff., Aug. 17, 1995, para. 9.) Ms. Montpetit no longer asserted that any partners other than Randell were "assessed with *their full distributive share of partnership income.*" (App. *infra*, 60a.)

Therefore, Randell's contention that he is the only one of 288 partners in GAT and Conarbco to be assessed based on a distributive share of partnership income was uncontradicted in the motion for summary judgment at the District Court level and in response to the inquiry of the Court of Appeals panel following oral argument.

Nevertheless, on August 28, 1995, the Court of Appeals affirmed the District Court's grant of summary judgment for the Government. The Court of Appeals ruled that Randell had defaulted because he did not raise his contentions in the Tax Court following the disallowance of the partnerships' losses.

REASONS WHY THE WRIT SHOULD ISSUE

I

THE COURT OF APPEALS' DECISION THAT THE DISTRICT COURT LACKED JURISDICTION AND COULD NOT HEAR RANDELL'S CLAIM ON THE MERITS IMPROPERLY DENIED RANDELL AN OPPORTUNITY TO ARGUE THAT A DISTRIBUTIVE SHARE OF SHAM PARTNERSHIP GAIN COULD NOT BE TAXED AND TO ARGUE THAT HE COULD NOT BE SINGLED OUT FOR DISPARATE TREATMENT

A. Statutory Scheme

The Tax Equities and Fiscal Responsibility Act of 1982 ("TEFRA") (Section 402(a) of Public Law 97-248, Sept. 3, 1982, codified as 26 U.S.C. Sec. 6221 et seq.), took effect for partnership tax years that began after September 3, 1982. TEFRA changed the way that partnership items would be treated for tax purposes. Prior to TEFRA, individual partners were examined and any item on the tax return of an

individual partner, including a partnership item, could be adjusted. Adjustments often were made for particular partners and not for others.

TEFRA was enacted to achieve consistent treatment of partnership items for all partners in a partnership. Under TEFRA (26 U.S.C. 6221 through 6233), the tax treatment of any partnership item generally would be determined at the partnership level. 26 U.S.C. 6221. The partner who was designated to be in charge of tax matters was empowered to file a petition in court "for a readjustment of the partnership items" if he or she disagreed with the treatment accorded by the I.R.S. Such a petition is required to be filed within 90 days after a notice of "final partnership administrative adjustment" ("FPAA") is mailed. 26 U.S.C. 6226(a). Any other "notice partner" could file a petition in court for a "readjustment of the partnership items" within 60 days following the expiration of the 90-day period if the tax matters partner did not file a petition within the 90-day period. 26 U.S.C. 6226(b)(1). No court proceeding is provided under TEFRA for any partner who does not petition for a "readjustment of the partnership items."

TEFRA did not change the laws of partnership tax accounting and the tax treatment of partners. Those statutes are codified at 26 U.S.C. 701 et seq. The law in this regard, both before and after TEFRA, generally provides that partnerships do not pay income taxes. They report their items of income and expense, and gain and loss to the I.R.S., and they report to each individual partner that partner's "distributive share" of such partnership net income and gains and losses from sales or exchanges of capital assets. Each individual partner is required to report his or her distributive share of income, and of capital gain or loss on his or her own individual income tax return. 26 U.S.C. 701-703.

B. Because the I.R.S. Determined that the Transactions of Conarbco and GAT Were Shams, No Partner Could Be Assessed a Tax For a Distributive Share of Gain

This case presents a new twist on an unwavering chain of cases dating back sixty years that holds that losses arising out of sham transactions, or out of transactions that lack economic substance, may not be recognized for federal income tax purposes. See, *Gregory v. Helvering,* 293 U.S. 465 (1935). The new twist is the fact that this case involves gains from partnership transactions that the I.R.S. determined were shams, and the I.R.S.'s efforts to assess a tax against Randell (and only Randell) for his failure to report his distributive share of such sham partnership gains.

The District Court held that it lacked jurisdiction to hear Randell on the merits. Randell invoked the jurisdiction of the District Court under 26 U.S.C. 6213(a) and 7421(a), which give the District Court jurisdiction to enjoin collection and assessment of any tax if the notice required by 26 U.S.C. 6212(a) is not mailed to the taxpayer. It was undisputed that the "notice of deficiency" was not mailed. However, the notice of deficiency is not required for the assessment or collection of a "computational adjustment." 26 U.S.C. 6230(a). A computational adjustment is defined as "the change in the tax liability of a partner which properly reflects the treatment...of a partnership item." 26 U.S.C. 6231(a)(6). For reasons that appear below, the District Court erroneously concluded that the assessments imposed against Randell were computational adjustments.

The District Court concluded erroneously that Randell had the opportunity to be heard by filing a petition at the partnership level pursuant to 26 U.S.C. 6226(b). Based on the foregoing, the District Court granted the Government's motion for summary judgment, and the Court of Appeals erroneously affirmed that ruling.

The District Court held that Randell was required in the first instance to report his share of such gains from these partnership transactions irrespective of the fact that the I.R.S. later determined that the transactions that gave rise to these "gains" were shams. Accordingly, the District Court granted the Government's motion for summary judgment and denied Randell's motion. The court granted the Government's motion even though no discovery was conducted and Randell specified what discovery he needed.

At no stage below has the Government ever claimed that Randell received one nickel of actual, real income or that he claimed one nickel of false or otherwise improper deductions, credits or other tax benefits.

Nevertheless, the Government has imposed a ruinous, assessment in excess of four million dollars of "income" tax and interest even though Randell received no income and did not claim any false deductions. The Courts below held that Randell was not entitled to have a hearing on the merits in the District Court.

The Government has not cited a single instance where it has ever imposed a tax upon a partner for the partner's share of partnership income from sham transactions.[2]

The proposition that no tax may be assessed based upon "gain" from a sham transaction is so obvious that it is rarely litigated. The litigation that has occurred, however, involves a landmark decision of the United States Tax Court. *Glass v. Commissioner,* 87 T.C. 1087 (1986); *see also, Maring v. Commissioner,* T.C. Memo 1988-469, 56 T.C.M. 343.

In *Glass,* the Commissioner disallowed deductions for losses arising out of sham "straddle" transactions that are identical to the transactions involved herein. (*Compare;* 87 T.C. at 1156-1157 with Appendix, *infra, 52a-55a*). After it disallowed the sham losses in its 100-page opinion, the Tax Court excluded the related sham gains that the Commissioner sought to tax. The Tax Court stated:

> In conclusion, we hold that the London Option transaction - petitioners' multiple and complex tax straddle scheme encompassing prearranged results - lacked economic substance and was a sham.

---

[2]There are situations where the Commissioner is permitted to impose a tax upon "phantom income," i.e. income that a taxpayer has not actually received. These situations arise only under the "Duty of Consistency." Thus, where a taxpayer has claimed a tax benefit in an earlier year that is barred by the statute of limitations, and it would be inequitable not to recognize taxable income in a later year as a result of the prior tax benefit, this Court has permitted such a tax on "phantom income" to be imposed. *Commissioner v. Tufts,* 461 U.S. 300, 103 S. Ct. 1826 (1983); *see also, Herrington v. Commissioner,* 854 F.2d 755 (5th Cir. 1988); *Rice's Toyota World, Inc. v. Commissioner,* 752 F.2d 89 (4th Cir. 1985); *Johnson v. Commissioner,* T.C. Memo 1992-369, 63 T.C.M. (CCH) 3197, T.C.M. (P-H) 92,369, 1992 WL 145282 (U.S. Tax Ct.) (1992). That situation is not present in this case because Randell did not claim tax benefits from his alleged partnership interests in any year.

> Petitioners consequently may not deduct the losses claimed by them in Year One of their straddle transactions. *It follows, of course, that since the straddle transactions were a sham, gains reported by petitioners in Year Two and thereafter do not constitute taxable income to them, and we so hold.*

87 T.C. at 1177. (Emphasis added.)

Glass is the law of the land. It is the largest consolidated action in Tax Court history, involving some 1,400 taxpayers. *Horn v. Commissioner,* 968 F.2d 1229 (D.C. Cir. 1992). *Glass* previously was hailed by Second Circuit as a "landmark" case which has been affirmed in nine other circuits of the Court of Appeals. *Gardner v. Commissioner,* 954 F.2d 836, 836 (2d Cir. 1992). *Glass* has been affirmed by every circuit Court of Appeals to which it has been appealed by taxpayers. *Lerman v. Commissioner,* 939 F.2d 44 (3d Cir. 1991).

Despite the fact that hundreds of taxpayers appealed in *Glass* on the issue of the deductibility of the losses, the Government never filed a cross-appeal on the issue of the non-recognition of the gains.

In its opinion below, the Court of Appeals did not discuss the decision of the Tax Court in *Glass,* although Randell relied on that decision extensively. The Court erroneously concluded that Randell was seeking a determination as to whether "the partnerships' income was properly included on the partnerships' returns." Since that involves a partnership issue, the Court held that the District Court had no jurisdiction to reach that issue. In reality, Randell did not seek such a determination. The I.R.S. already had determined as a fact that the partnerships had no income to recognize, and *Glass* determined as a matter of law that the partnerships could have no income where the underlying transactions were sham.

The Court also based its decision on its conclusion that Randell waived his right to be heard on the merits because he failed to raise the issue at the partnership level following the administrative adjustments made to Conarbco and GAT. However, the partnership audits did not concern Randell. At the partnership level, the I.R.S. disallowed losses that he had not claimed, and stated that gains (as well as disallowed losses) could "not be recognized for federal income tax purposes." There was no "case or controversy" for Randell to challenge at the partnership level because Randell fully agreed with that result. No court would have had jurisdiction to hear Randell at the partnership level. The jurisdiction of all relevant courts extends only to petitions for "readjustment of the partnership items." I.R.C. 6226(a),(b)(1). Randell did not seek a *readjustment* of *partnership* items. The I.R.S.' adjustments were quite acceptable to him. Since Randell did not disagree with the Commissioner's determinations on the partnership level, no court had jurisdiction to hear him on the partnership level. *Malat v. Commissioner,* 302 F.2d 700 (9th Cir. 1962), *cert. denied,* 371 U.S. 934 (1962).

The controversy between Randell and the I.R.S. only arose on the *partner level* after the I.R.S. assessed a tax against Randell (and only Randell) based on gains that the I.R.S. had determined at the *partnership level* to be non-existent or sham. Once it is determined that a partnership has no gain, there simply can be no distributive share of gain upon which to base an assessment against a partner. 26 U.S.C. 6221, 701-703; *Glass, supra,* 87 T.C. at 1177. The Court erroneously held that Randell could not be heard on the merits at the partner level.

C. Because the I.R.S. Assessed a Tax Only Upon Randell for a Distributive Share of Partnership Income, and Did Not Assess a Tax Upon the Other 287 Limited Partners Based on Their Distributive Shares of Partnership Income, The Assessments Could not Have Been "Computational Adjustments," for Which Reason the District Court Did Have Jurisdiction

The proceedings below did not resolve Randell's contention that he was "the only partner who was taxed upon a share of gross partnership gains." (App. *infra*, 56a-68.). It appears that Randell was the only partner who was assessed based upon a distributive share of partnership income and that any other partner who was assessed was assessed only on the basis of disallowing his or her false deductions. However, Randell did not claim any deductions arising from GAT or Conarbco. Thus, it appears that Randell was treated differently at the individual partner level.

If Randell was treated differently, then the adjustment as to him did not "properly reflect the treatment of partnership items" under 26 U.S.C. 6231(a)(6). Therefore, the assessment imposed upon Randell was not a mere "computational adjustment" that would not require a notice of deficiency. Accordingly, the deficiency procedures of Subchapter B did apply (26 U.S.C. 6230(a)(1)), a notice of deficiency was required, and, because one was not mailed, the District Court did have jurisdiction to hear Randell on the merits. 26 U.S.C. 6212(a), 6213(a), 7421(a).

II

THE DECISION OF THE DISTRICT COURT WAS AN IMPROPER USE OF SUMMARY JUDGMENT, AND THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THAT DECISION

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), this Court held, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." The effect of granting a motion for summary judgment is to decide the case against a party without allowing that party an opportunity for trial. For this reason, summary judgment should be cautiously invoked and only granted after careful consideration. The burden of proof rests with the moving party to show that there is no dispute about any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

That there was a dispute about a material issue is illustrated graphically from the fact that the Court of Appeals requested evidence at the appellate level and did not receive it. (App. *infra*, 56a-68a.) Moreover, there was no proof at the District Court to rebut Randell's statement that he was singled out for disparate treatment.[3] Nor was there ever proof

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[3]Randell's contention that he was singled out was based on a statement by Judge Julian Jacobs of the U.S. Tax Court in parallel proceedings before that Court. Judge Jacobs stated that he is the judge who is assigned to hear the Tax Court cases regarding these partnerships, that he has heard these cases for six or seven years and that he knows that the I.R.S. is "not making the partner pick up the income, which apparently would be in a subsequent year." Judge Jacobs went on to say, "Now if that is what happened here, that the government is saying, 'I don't care that Mr. Randell didn't report a loss,' I'm going to dismiss the case. Because he didn't pick up any losses, he sure didn't pick up any income. I don't understand why the government is pursuing this." (Record in the Court of Appeals, Appendix, 265-266.)

in either court regarding whether the IRS's determinations that the gains were sham applied to the gains attributed to Randell. (App. *infra,* at 31a-33a, 42a.)

On this record, the Court of Appeals should have remanded the case to the District Court for discovery. Instead, the Court of Appeals requested that the Government submit evidence at the appellate level. The Government initially presented an affidavit that supported its denial that Randell was singled out. However, the Government withdrew that affidavit four months later, leaving the Court of Appeals without evidence to rebut Randell's contention. In addition, Randell submitted an affidavit prior to the District Court's June 30, 1994 award of summary judgement to the Governmenet. In it, he stated that he withdrew as a partner, and he requested discovery to prove his statement. No discovery ever was afforded, pursuant to Rule 56(f), Federal Rules of Civil Procedure.

Clearly, there were genuine disputes about material facts. A dispute about a material fact was acknowledged even by the Court of Appeals, and that dispute has never been resolved. Summary judgment should not have been granted.

CONCLUSION

Based upon the foregoing, the Writ should issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel of Record for Petitioner

May, 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1097–August Term, 1994
(Argued March 13, 1995 Decided 8/28/95)
Docket No. 94-6220

JACK RANDELL,
Plaintiff–Appellants,

—v.—

UNITED STATES OF AMERICA,
Defendant–Appellee.

Before:
MESKILL, CARDAMONE, and ALTIMARI ,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Goettel, J.) granting the government's motion for summary judgment dismissing plaintiff's complaint that sought to enjoin the assessment of deficient taxes.

Affirmed.

JARED J. SCHARF, White Plains, New York, for *Plaintiff-Appellant.*

DEBORAH Y. YEOH, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney, Nancy G. Milburn, Assistant United States Attorney, Southern District of New York, New York, New York, of counsel), for *Defendant-Appellee.*

CARDAMONE, Circuit Judge:

This is an appeal in a tax case. Plaintiff Jack Randell brought suit in the United States District Court for the Southern District of New York (Goettel, J.) seeking to enjoin assessment of deficiencies made by the Internal Revenue Service (IRS) based on his distributive share of income from two partnerships. The district court granted summary judgment to the government and plaintiff appeals. We affirm.

BACKGROUND

A. Statutory and Regulatory Framework

Before laying out the facts of this dispute, it will be helpful to set forth briefly the statutory and regulatory context in which they arise. It is a basic tenet of federal income tax law that partnerships are not taxable entities. I.R.C. § 701 (1988); Treas. Reg. § 1.701-1 (1960). Therefore, rather than file tax returns as individuals and corporations do, partnerships simply file informational returns. I.R.C. § 6031 (1988); Treas. Reg. § 1.6031-1 (as amended in 1978). Although partnerships do not pay federal income tax, each partner is individually liable for income taxes relating to his or her distributive share of partnership income, gain, loss, deduction and credit. I.R.C. §§ 701, 702 (1988 & Supp. IV 1992); Treas. Reg. § 1.702-l(a) (as amended in 1992). Prior

to 1982 adjustments of partnership items were determined at the individual partners' level, resulting in duplication of administrative and judicial resources and inconsistent results between partners.

To solve this problem, Congress enacted the Tax Treatment of Partnership Items Act of 1982, as Title IV of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324, 648 (codified as amended at I.R.C. §§ 6221-6233 (1988 & Supp. IV 1992)), which created a single unified procedure for determining the tax treatment of all partnership items at the partnership level. A "partnership item" is one "more appropriately determined at the partnership level than at the partner level," I.R.C. § 6231(a)(3), and includes "[t]he partnership aggregate and each partner's share of...[i]tems of income, gain, loss, deduction, or credit of the partnership." Treas. Reg. § 301.6231(a)(3)-l(a)(l)(i) (1986). A "nonpartnership item" is one that is "not a partnership item," I.R.C. § 6231(a)(4), and is therefore determined at the individual partner's level. As a consequence, assessments for nonpartnership item adjustments are subject to the statutory notice of deficiency procedure. I.R.C. §§ 6212(a) (1988); 6230(a)(2).

A partner generally must file an individual income tax return that is consistent with the partnership return. I.R.C. § 6222(a). One example of inconsistent treatment occurs when a partner does not file an individual tax return reporting his distributive share of income as reported by the partnership on a Schedule K-1. A partner disagreeing with the partnership's reporting of his or her distributive share of partnership items has a choice: the partner must either (a) notify the IRS of an election to treat a partnership item inconsistently with the treatment of the item on the partnership return, I.R.C. § 6222(b), or (b) request an administrative adjustment of the partnership item, I.R.C. § 6227(a). In the absence of either notification or request for

administrative adjustment, a partner who treats items inconsistently with the partnership's treatment of items may be assessed with a deficiency, without notice, as a computational adjustment. I.R.C. §§ 6222(c), 6230(a)(1). A "computational adjustment" means a "change in the tax liability of a partner which properly reflects the treatment...of a partnership item." I.R.C. § 6231(a)(6). In other words, the IRS may assess a partner for tax due in order to conform a partner's treatment of an item with the partnership's treatment of that item.

Just as the tax law generally requires individuals to be given notice of an assessed deficiency, TEFRA requires the IRS to notify certain partners when it undertakes an administrative proceeding to adjust a partnership item. I.R.C. § 6223(a). The IRS mails to the "tax matters partner" (generally the general partner designated by the partnership to handle tax matters, I.R.C. § 6231(a)(7)) a final partnership administrative adjustment (FPAA or administrative adjustment), reflecting its determination to adjust, and thereafter sends copies of the FPAA to each "notice partner." I.R.C. §§ 6223(a), 6223(b), 6Z31(a)(8). When a partnership has 100 or more partners, a notice partner is generally one who owns at least a one percent interest in the partnership. I.R.C. § 6223(b)(1).

The tax matters partner may contest the FPAA within 90 days after its mailing by filing a petition for readjustment in Tax Court, the Court of Federal Claims or the appropriate federal district court. I.R.C. § 6226(a). If no such petition is filed, any notice partner may file a petition for readjustment within the next 60 days. I.R.C. § 6226(b)(1). All partners with an interest in the outcome of the proceeding are entitled to participate in an action brought by the tax matters partner or a notice partner, I.R.C. §§ 6226(c), 6226(d), thereby meeting TEFRA's objective of ensuring that all partners may, if they choose, litigate a dispute with the IRS in a single proceeding.

After the FPAA adjustments become final or conclusively established (i.e., after they go unchallenged or are judicially resolved in a § 6226 proceeding), the IRS may assess partners with their distributive share of the adjusted partnership items, without notice, as a computational adjustment. I.R.C. §§ 6225, 6230(a). Statutory notice is not required since, under TEFRA, the partnership item has been resolved at the partnership level and cannot be contested at the individual partner level. With this statutory background in hand, we pass to the facts.

B. Government Arbitrage Trading Company

Plaintiff Randell failed to file an individual tax return for the year 1983. That year he had a 1.572 percent limited partnership interest in the Government Arbitrage Trading Company (GATC), a partnership of more than 100 partners. On its partnership return for that year, GATC reported partnership income of $4,224,972, expenses of $56,475,053, a short-term capital loss of $49,412, and a long-term capital loss of S74,117- GATC issued a Schedule K-l to Randell for that year reporting his di:tributive share as an ordinary loss of $821,350, a net short- term capital loss of $777, and a net long-term capital loss of $1,165. Plaintiff admits receiving a copy of the Schedule K-l indicating his share of the partnership's ordinary and capital losses.

After auditing the partnership for 1983, the IRS determined that adjustments to GATC's tax return were necessary. The government disallowed GATC's claimed expenses of $56,475,053 and its short-term capital loss of $49,412. These adjustments resulted in an increase in the amount of previously reported partnership income that was taxable. On October 24, 1991 the IRS issued an administrative adjustment to GATC's tax matters partner. In November 1991 the IRS sent copies of the FPAA to GATC's notice partners, including plaintiff. On March 16, 1992

GATC's tax matters partner filed an untimely petition with the United States Tax Court which was dismissed for lack of subject matter jurisdiction. *See Government Arbitrage Trading Co. v. Commissioner,* 67 T.C.M. (CC~) 2551 (1994) (tax matters partner failed to file petition within 90-day period and was not entitled to file petition as a notice partner within 60 days after the close of the 90-day period because petitioner, owning only a .5 percent interest in partnership profits, did not qualify as a notice partner). No notice partner, including Randell, filed a petition for readjustment.

C. Conarbco

Randell was also a limited partner in Conarbco, a partnership of more than 100 partners, with 1.7992 percent, 1.798 percent and 1.798 percent interests during the years 198S, 1986, and 1987, respectively. Randell failed to file individual tax returns for the years 1985 and 1986, and in April 1990 filed an untimely return for 1987, reporting his distributive share of income from Conarbco.

On its 1985 partnership return Conarbco had reported income of $66,212,174 and expenses of $57,369,S74. Its 1986 partnership return showed income of $70,184,748, expenses of $61,587,16S, and a net long-term capital loss of $278,023. For 1987 the partnership reported income of $7,789,054, expenses of $9,584,515, a net short-term capital loss of $295,464 and a net long-term capital loss of $435,257. Conarbco issued Schedules K-1 to Randell, reporting as follows: for 1985 plaintiff had a distributive share of ordinary income of $160,243, dividends of $3,905, a net short-term capital gain of $32,057 and a net long-term capital gain of $2,585; for 1986 plaintiff's distributive share was ordinary income of $l55,712, a net short-term capital gain of $33,715, and a net long-term capital loss of $5,002; and for 1987, although Conarbco appears to have had a net loss, plaintiff's distributive share of ordinary income was $29,526. Randell admits receiving copies of these schedules.

Upon auditing Conarbco for the tax years 1985, 1986, and 1987, the IRS determined that certain partnership item adjustments were necessary. The IRS disallowed Conarbco's 1985 claimed expense of $57,369,574. For 1986, the IRS disallowed Conarbco's claimed expenses of $61,587,165 and its long-term capital loss of $278,023. The IRS similarly disallowed the partnership's 1987 expenses of $9,584,515, its long-term capital loss of $435,257, and its short-term capital loss of $295,464. These adjustments had the effect in each year of increasing the amount of previously reported partnership income that was taxable. This point bears repeating: while partnership income was not adjusted by the IRS, the act of disallowing deductible expenses resulted in a greater amount of that income becoming taxable.

On August 30, 1991 the IRS issued an administrative adjustment to Conarbco's tax matters partner. In September 1991 the IRS sent copies of the administrative adjustment to Conarbco's notice partners, including Randell. No Conarbco partner filed a petition for a readjustment.

D. Assessment Against Randell

On January 23, 1993, after the GATC and Conarbco partnership item adjustments were finalized, the IRS assessed plaintiff for his distributive share of partnership income. Portions of the original assessment have since been abated due to IRS error. The remaining assessments are for the taxes and interest due on $2,702,411 of unreported income Randell earned from the partnerships. That amount breaks down as follows: $66,417 for 1983;[1] $1,229,836 for 1985;[2] $1,295,637 for 1986;[3] and $110,521 for 1987.[4] The total tax on this unreported income amounts to about $1.3 million, with interest due of approximately $1.6 million, for a total assessment of roughly $2.9 million.

E. District Court Proceedings

In June 1993 plaintiff filed a complaint in the Southern District of New York seeking to enjoin the collection of income taxes assessed against him for 1983, 1985, 1986, and 1987 on the ground that he was not served with a statutory notice of deficiency. In December 1993 the parties cross-moved for summary judgment. On April 28, 1994 the district court partially granted the government's motion and denied plaintiff's motion. The district court then granted the parties' cross-motions for reargument and, in a memorandum decision entered July 1, 1994, partially granted each party's

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[1]Randell's 1.572% share of GATC's 1983 total income of $4,224,972.

[2]The sum of (1) Randell's 1.7992% share of Conarbco's 1985 total income of $66,212,174, which equals $1,191,289, and (2) $38,547 of dividends, short term capital gain and long term capital gain.

[3]The sum of (1) Randell's 1.798% share of Conarbco's 1986 total income of $70,184,748, which equals $1,261,922, and (2) $33,715 short term capital gain.

[4]Randell's 1.798% share of Conarbco's 1987 total income of $7,789,054, which equals $140,047, less the $29,526 of income from Conarbco reported on plaintiff's 1987 individual tax return.

motion for summary judgment. After being alerted by the IRS of a factual misstatement in that decision, the district court issued a *nunc pro tunc* order amending its earlier decision so as to grant summary judgment to the government in full. Accordingly, a final judgment was entered dismissing plaintiff's complaint. Randell appeals from that judgment.

DISCUSSION

We review de novo the grant of summary judgment. *See Pagan v. NYNEX Pension Plan,* 52 F.3d 438, 441 (2d Cir. 1995). When there are no genuine issues of material fact in dispute, as is the case here, "our task is to determine whether the district court correctly applied the law." *Siskind v. Sperry Retirement Program,* 47 F.3d 498, 503 (2d Cir. 1995).

The dispute between Randell and the goverment is properly framed by examining our subject matter jurisdiction. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. In *United States v. Mitchell,* 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood,* 312 U.S. 584, 586 (1941)). The federal government's waiver of its sovereign immunity must be unequivocally expressed, *see United States v. Kina,* 395 U.S. 1, 4 (1969), and is to be strictly construed, *see Sherwood,* 312 U.S. at 590.

In the context of tax assessments and collections ths government's sovereign immunity has been codified by the Anti- Injunction Act, I.R.C. § 7421(a) (1988), which states: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." The purpose of the Act is to protect "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement

judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)).

Under the Anti-Injunction Act there is a judicially created exception for taxpayers, *see Enochs*, 370 U.S. at 7, which Randell argues applies to him. To qualify for this exception a taxpayer must show (1) that "it is clear that under no circumstances could the Government ultimately prevail" on the tax liability and (2) that "equity jurisdiction otherwise exists" because the taxpayer would suffer irreparable injury if collection were effected. *Id.* A court must "take the view of the facts that is most liberal to the Commissioner, not to the taxpayer seeking injunctive relief. *Laino v. United States*, 633 F.2d 626, 632 (2d Cir. 1980). Randell has failed to make the requisite showing.

By its own terms, the Anti-Injunction Act also includes an exception for injunction proceedings brought under I.R.C. § 6213(a). That section provides that a taxpayer has certain time periods to challenge a notice of deficiency and that "no assessment of a deficiency in respect of any tax...and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration" of the appropriate time period. § 6213(a) continues, "[n]otwithstanding the provisions of [the Anti-Injunction Act], the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court." *Id.* Randell avers, therefore, that the district court had jurisdiction to enjoin the IRS' assessment and collection efforts since he had not received the statutorily required notice of deficiency.

The government's response, with which the district court agreed, was that TEFRA, specifically § 6230(a)(1), makes

the mailing of a notice of deficiency and the related prohibition on assessment until notice is mailed inapplicable where the taxes assessed against a partner are computational adjustments to conform that partner's treatment of a partnership item to the treatment of that item by the partnership. Therefore, if the assessment against Randell is a computational adjustment the exception to the Anti-Injunction Act does not apply. In that case, the Act's prohibition on injunctions and the government's sovereign immunity deprive the Court of subject matter jurisdiction. Our jurisdiction accordingly depends on resolving whether the assessments against plaintiff are or are not computational adjustments. Randell agrees that where assessments are computational adjustments and no injunction may issue, no notice is required. But he maintains that the assessment in question is not a computational adjustment and puts forward three arguments that merit discussion, and to which we now turn.[5]

I Treatment of Partnership Items as Reflected by the Assessments

As noted above, a computational adjustment is "the change in the tax liability of a partner which properly reflects the treatment...of a partnership item." I.R.C. § 6231(a)(6). Plaintiff's primary contention is that the assessments are not computational adjustments because they do not properly reflect the treatment of a partnership item. To support his assertion, Randell points to one alternative theory put forward by the IRS to disallow the expenses of GATC and Conarbco: that the expenses were "sham," the result of activity lacking economic substance. Seeking symmetry in

[5]Randell also argues that as a result of his previous litigation with the IRS, the government is collaterally estopped from asserting the tax assessments now due. A review of that litigation shows that the issues involved in the instant litigation were not there implicated. Hence, Randell's collateral estoppel claim lacks merit.

the tax code, plaintiff's theory asserts that if the expenses are sham and the partnerships were engaged in no activities other than those giving rise to the sham expenses, then the partnership income resulting from those activities must also be "sham." Taxing his distributive share of this sham partnership income, plaintiff states, does not properly reflect the treatment of a partnership item. We may not, however, consider the merits of Randell's claim.

While we are doubtful of Randell's sham income theory, compare I.R.C. § 61(a) (1988) "gross income means all income from whatever source derived") *with* Treas. Reg. § 1.165-1(b) (as amended in 1977) ("Only a bona fide *loss* is allowable. Substance and not mere form shall govern in determining a *deductible loss*." (emphasis added)) and *Barnett v. Commissioner,* 364 F.2d 742 (2d Cir. 1966) (per curiam) (interest deduction disallowed where transaction was sham), *cert. denied,* 38S U.S. 1005 (1967); but *see Maring v. Commissioner,* 56 T.C.M. (CCH) 343 (1988) (gains from sham transactions eliminated), we may not reach its merits.

Plaintiff's contention would require us to determine whether the partnerships' income was properly included on the partnerships' returns. But, as observed earlier, partnership income is a partnership item, see Treas. Reg. § 301.6231(a)(3)-l(a)(l)(i), and we are precluded under TEFRA from examining a partnership item in an individual partner's proceeding, *see Palmer v. Commissioner,* 63 T.C.M. (CCH) 3162, 3164 (1992) ("[T]he Court has no jurisdiction to review [Commissioner's] adjustments of partnership items in the context of [an individual partner's] deficiency proceeding"); *Trost v. Commissioner,* 95 T.C. 560, 563 (1990) ("Congress intended administrative and judicial resolution of disputes involving partnership items to be separate from and independent of disputes involving nonpartnership items. Consequently, the portion of any deficiency attributable to a 'partnership item' cannot be considered in the partner's

personal case..." (quoting *Maxwell v. Commissioner,* 87 T.C. 783, 788 (1986))).

Plaintiff had earlier opportunities, of which he failed to avail himself, to challenge the partnerships' reported income. In 1985 and 1986 Conarbco reported partnership income and issued Randell Schedules K-1 reporting his distributive share of income. By failing to file a return, Randell treated that income inconsistently with the partnership's treatment of that item. Randell was then required, as stated, to either notify the IRS of the inconsistent treatment, § 6222(b), or to request an administrative adjustment of the partnership item, § 6227(a). He did neither. When the IRS disallowed GATC's deductions for 1983, and Conarbco's deductions for 1985, 1986, and 1987, the result was to increase the amount of partnership income subject to tax. Randell, as a notice partner, could have then sought to have the partnerships' previously reported income reduced to zero. He failed to do so. When no valid petition is filed, the tax treatment of partnership items as set forth in the partnership return and as administratively adjusted by the IRS becomes conclusively established and may not thereafter be contested. *See Sente Inv. Club Partnership v. Commissioner,* 95 T.C. 243, 249 (1990).

Thus, GATC's 1983 income and Conarbco's 1985, 1986, and 1987 income may not be revisited in this litigation. Nor may Randell's interest in each partnership for the corresponding year, as set forth on the Schedules K-1. In determining whether the assessments properly reflect treatment of partnership items, and were therefore computational adjustments, the inquiry is whether the assessments taxed the appropriate ownership percentage of the partnership income reported on the partnership return, as adjusted by the administrative adjustment. In each case the assessment against Randell is equal to the amount of income reported in the partnership return, without deduction for-expenses pursuant to their disallowance in the FPAA,

multiplied by the ownership share reported in the Schedule K-1 Randell's contention that the assessments did not properly reflect the treatment of partnership items, and so were not computational adjustments, is therefore without merit.

II Randell's Status as a Partner

Plaintiff also contends that the assessments cannot be computational adjustments since he was not a partner in GATC in 1983 nor in Conarbco in 1985, 1986, or 1987. Summary judgment is appropriate when "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In opposing a summary judgment motion "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Plaintiff failed to show that a genuine issue existed as to his status as a partner in GATC or Conarbco.

The government's proof of Randell's partnership status was the Schedules K-1 issued by GATC and Conarbco to Randell, identifying him as a partner. Plaintiff asserted that these schedules were erroneously issued. Plaintiff's statement pursuant to Local Civil Rule 3(g) declared that he "made an investment that probably made him a limited partner in the partnerships.... [But] Plaintiff may have submitted letters of resignation." The statement went on to explain that Randell's tax file had been turned over to a grand jury and not returned and that "[a]ny copies of letters of resignation from the partnerships could be among these documents." These statements, made by Randell's attorney, did not purport to be made on personal knowledge as required under Fed. R. Civ. P. 56(e). As unsupported assertions they were inadequate to defeat a motion for summary judgment. *See Bevah v.*

Couahlin, 789 F.2d 986, 989- 90 (2d Cir. 1986); *United States v. Potamkin Cadillac Corp.,* 689 F.2d 379, 381 (2d Cir. 1982).

Plaintiff also points to his affidavit, filed in support of his motion to vacate (which the district court deemed a motion for reconsideration) and in opposition to the government's motion for reconsideration. In that affidavit Randell states, "I did pay money to become a partner in certain tax shelter partnerships. I do not recall their names. I do recall writing letters informing some or all of these partnerships that I resign as a partner. I believe that I wrote those letters in 1983 or 1984." But this affidavit was submitted after the summary iudqment motions were initiallv decided.

Civil Rule 3(j) of the Local Rules of the Southern District of New York does not permit the filing of affidavits on a motion for reargument unless directed by the court. *See also Caribbean Trading and Fidelity Corp. v. Nigerian Nat'l Petroleum Corp.,* 948 F.2d 111, 115 (2d Cir. 1991) (Civil Rule 3(j) "has been interpreted as precluding arguments raised for the first time on a motion for reconsideration"), *cert. denied,* 504 U.S. 910 (1992); *Morse/Diesel. Inc. v. Fidelitv and Deposit Co. of Md.,* 768 F. Supp. 115, 116 (S.D.N.Y. 1991) (under Local Rule 3(j) party may not advance new facts, issues, or arguments not previously presented to the court). Even were we to consider plaintiff's affidavit, it does not present a genuine issue as to his partnership status. The statement speculates that GATC and Conarbco were included in some partnerships he resigned from at some time in 1983 or 1984. His statement, if true, does not preclude the possibility that he resigned from GATC in 1984 or became a partner in Conarbco after resigning from other partnerships in 1983 or 1984. Also telling in this regard is plaintiff's memorandum of law in support of his motion to vacate, which states, "he may not have been a partner.

Randell may later concede that he was a partner. Before he does, he would like to see documents he provided to the grand jury..." A summary judgment motion cannot be defeated by a party wishfully thinking that proof might somehow appear to give life to a moribund claim. *See Gray v. Town of Darien,* 927 F.2d 69, 74 (2d Cir.), *cert. denied,* 502 U.S. 856 (19gl). Thus, no specific facts were timely alleged on personal knowledge to dispute the proof submitted by the government and no genuine issue existed as to Randell's status as a partner in GATC and Conarbco.

III Disparate Treatment

Randell's final contention need not detain us long. He declares that the assessments are not computational adjustments because they apply a theory unique to him, such that plaintiff has been treated differently from all other GATC and Conarbco partners. According to Randell, other partners were assessed additional taxes based on the disallowed partnership deductions they claimed. Since he never claimed deductions, plaintiff avers the IRS is instead taxing him on additional partnership income. Randell claims the application of a different theory precludes characterizing the assessments as computational adjustments.

Plaintiff's assertion of disparate treatment is wholly without merit. His theory rests on a mischaracterization of the assessments against other GATC and Conarbco partners, who presumably, unlike plaintiff, filed tax returns for the years in question. No tax was assessed against any partner on disallowed deductions *per se;* rather the act of dlsallowlng deductions results in a greater portion of income being taxable — that is, every partner is being taxed on income that is no longer offset by deducting an expense. We discern no other theory underlying the assessments made by the IRS. Nor does the fact that partners who previously filed taxes were assessed only for the additional income (as is plaintiff

for 1987), whereas Randell is being assessed for his entire distributive share of partnership income for 1983, 1985 and 1986, the years for which he failed to file an individual tax return, present a different theory behind the computational adjustments to plaintiff's tax liability.

CONCLUSION

The assessments against Randell were computational adjustments for which no notice of deficiency was required. Consequently, the district court properly dismissed the complaint for lack of subject matter jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of August, one thousand nine hundred and ninety-five.

Present: Hon. Thomas J. Meskill
Hon. Richard J. Cardamone
Hon. Frank X. Altimari,
CIRCUIT JUDGES.

Docket no.: 94-6220

JACK RANDELL,
Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,
Defendant - Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this Court.

For the Court
GEORGE LANGE III, Clerk

By Beth J. Meador
Administrative Attorney

judmnt_frm

A TRUE COPY
GEORGE LANGE III, CLERK
(stamped)

ISSUED AS MANDATE 4/24/96 (labeled)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACK RANDELL,	:
Plaintiff,	:
	: 93 Civ. 3979 (GLG)
-against-	: MEMORANDUM
	: DECISION
UNITED STATES OF AMERICA,	:
Defendant.	:

Plaintiff Jack Randell brings this action against the United States seeking to enjoin the government's efforts to collect taxes which he claims were illegally assessed for the tax years 1983, 1985, 1986 and 1987 and for an order directing that the assessment of said taxes be abated. The government has moved for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c), or, alternatively, for summary judgment, pursuant to Fed. R. Civ. P. 56(c). Plaintiff opposes and cross-moves for summary judgment.

FACTS

A. Background

At issue in this suit are taxes assessed against plaintiff for the 1983, 1985, 1986, and 1987 tax years as a result of Internal Revenue Service ("IRS") audits of two partnerships, the Government Arbitrage Trading Co. ("GAT") for the year 1983 and Conarbco for the years of 1985, 1986, and 1987. In the relevant years, plaintiff was a limited partner with an interest exceeding 1% in both GAT and Conarbco.

Prior to the IRS audits, GAT and Conarbco filed yearly schedule K-ls for plaintiff which indicated their calculation of his share of partnership income, credits, and deductions.

Plaintiff failed to file income tax returns for the years 1983, 1985, and 1986 and did not report the income or losses attributed to him in those years. He filed a late return for 1987 on April 17, 1990 in which reported income attributed to him by Conarbco's K-1.

In 1991, the IRS audited the two partnerships and determined that certain of their claimed expenses and losses should be disallowed. After the audits, the IRS issued a notice of Final Partnership Administrative Adjustment ("FPAA") to the tax partners of both GAT and Conarbco. In both instances, the tax partners failed to file a petition for readjustment within 90 days. GAT's tax partner filed a late petition in the Tax Court which was dismissed for lack of jurisdiction due to the untimely filing. T.C. Memo. 1994-136, U.S. Tax Court Docket No. 5620-92.

In addition, the IRS sent FPAAs to GAT and Conarbco's notice partners who included the plaintiff. The notice partners also failed to file a timely petition for readjustment.[1]

On January 25, 1993, the IRS sent plaintiff bills which reflected its determination of his tax liability for 1983, 1985, 1986, and 1987. The determinations were based upon the partnership adjustments as well as the partnership gains attributed to plaintiff in the K-ls which he had not taken. The bills for 1983, 1985, and 1986 contained the following statement, "Since we have no record of a return being filed

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[1]Plaintiff maintains he never received notice of the FPAAs and argues, even if he did receive notice, he did not have any reason to contest the GAT and Conarbco adjustments because he did not take any of the losses attributed to him by the partnerships. However, the FPAAs show that the IRS had made determinations that could lead to gains or additional income for the partnerships in those years which ultimately would be attributed to the partners. Hence, plaintiff had reason at that time to either report his share of the adjusted partnership income or contest the underlying IRS calculations.

by you for this tax period, we have computed the tax on your share of the examination changes to the partnership/corporate return at the highest tax rate for this year." The bill for 1987 included an alternative tax and an alternative minimum tax calculation.

On January 26, 1993, the IRS mailed plaintiff notices of deficiency, pursuant to 26 U.S.C. § 6212(a) for penalties resulting from the deficiencies assessed in the January 25th letter as a result of the partnership adjustments. However, no notice of deficiency was issued as to the January 25th assessments themselves.

Plaintiff filed a case in the Tax Court, *Randell v. Comm'r,* U.S. Tax Court Docket No. 5796-93. However, because a notice of deficiency is a prerequisite for Tax Court jurisdiction, plaintiff could only seek a redetermination of the penalties and not the January 25th assessments themselves. Thus, plaintiff filed this case seeking, *inter alia,* to enjoin the IRS's efforts to collect on the January 25th assessments.

B. Tax Assessments

Before determining whether summary judgment would be appropriate, we first set forth the IRS's grounds for its assessments.

1. Tax Year 1983

In 1983, GAT filed a Schedule K-1, reporting plaintiff's distributive share of ordinary loss as $821,350.00, short-term capital loss of $777.00, and long-term capital loss of $1,165.00.

The FPAA issued to GAT reflected an IRS determination that $56,475,053.00 of GAT's claimed expenses for 1983 should be disallowed and that its partnership income should be increased by that amount. The IRS also determined that

GAT's short-term capital loss should be decreased by $49,412.00.[2]

On January 25, 1993, the IRS assessed plaintiff additional taxes for 1983 exceeding $400,000.00 and over $800,000.00 in interest. The assessments were based upon disallowance of the distributive losses originally reported in the K-1 (which totaled $823,292.00) and an assessment of $66,417.00 in additional distributive income based upon the disallowed partnership expenses.

2. Tax Year 1985

In 1985, Conarbco filed a Schedule K-1 reporting plaintiff's distributive share of ordinary income as $160,243.00, dividends of $3,905.00, and short-term capital gain of $32,057.00.

The FPAA issued to Conarbco reflected an IRS determination that $57,369,574.00 of Conarbco's claimed expenses for 1985 should be disallowed and its partnership income increased by that amount.

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[2]Over $55 million in disallowed interest expenses and the adjustment to short-term capital loss were related to GAT's "T- bill, repurchase agreement, reverse repurchase agreement and other similar transactions." The IRS determined that gains, losses, and interest expenses attributable to those transactions could not be recognized because GAT failed to establish their occurrence. The IRS further determined that the transactions were not bona fide economic transactions. It offered three other alternative positions for disallowing the interest expense and the short-term capital loss.

The disallowance of the remainder of the expenses was due to the IRS's determination that the expenses were unsubstantiated, unreasonable and excessive. In the alternative, the IRS determined that the expenses were either for syndication or were capital in nature and not currently deductible.

As a result, the IRS assessed plaintiff over $600,000.00 in tax and over $700,000.00 in interest based upon the $198,790.00 originally reported by Conarbco as his distributive income on the K-1 and $1,031,046.00 of additional distributive income based upon the disallowed partnership expenses.

3. Tax Year 1986

In 1986, Conarbco filed a Schedule K-1 reporting plaintiff's distributive share of ordinary income as $155,712.00, short-term capital gain of $33,715.00, and long-term capital loss of $5,002.00.

The FPAA issued to Conarbco reflected an IRS determination that $61,587.00 of Conarbco's claimed expenses should be disallowed and that its partnership income should be increased by that amount. It also determined that its long-term capital loss should be decreased $278,023.00.

As a result, the IRS assessed plaintiff over $600,000.00 in tax and over $600,000.00 in interest based upon the $189,427.00 of distributive income reported on the K-1, disallowance of the $5,002.00 loss reported on the K-1, and $1,115,410.00 of additional distributive income based upon the disallowed partnership expenses.

4. Tax Year 1987

In 1987, Conarbco filed a Schedule K-1 reporting plaintiff's distributive share of ordinary income as $29,526.00 which plaintiff reported on his 1987 income tax return.

The FPAA issued to Conarbco reflected an IRS determination that $9,584,515.00 of Conarbco's expenses should be disallowed and that its partnership income should

be increased by that amount. The IRS also determined that Conarbco's short-term capital loss should be decreased $295,464.00 and that its long- term capital losses should be decreased by $435,257.00.[3]

As a result, plaintiff was assessed over $40,000.00 in tax and more than $30,000.00 in interest based upon $110,521.00 of additional distributive income based upon the disallowed partnership expenses.

After making several requests for payment, the IRS determined that its assessments were incorrect to the extent that they disallowed plaintiff $823,292.00 in losses for 1983 and $5,002.00 in losses for 1986 since plaintiff did not file income tax returns for those years and thus did not claim those losses as deductions. Thus, the only issue which remains is the propriety of the IRS's assessment of tax and interest based upon plaintiff's distributive share of disallowed partnership expenses and upon his distributive share of partnership income originally reported on the K-ls which he did not report due to his failure to file income tax returns for several years.

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[3]For the years, 1985, 1986, and 1987, Conarbco's disallowed interest expenses and long and short-term capital losses were related to its "T-bill, repurchase agreement, reverse repurchase agreement, and other similar transactions." The IRS determined that gains, losses, and interest expenditures with respect to the transactions could not be recognized because Conarbco failed to establish their occurrence. It further determined that the transactions were not bona fide and offered three additional alternative positions for its decision.

The IRS also disallowed deductions under the headings "Salaries & Wages," "Guaranteed Payments," "Taxes, and "Other Deductions." Its determinations were based upon Conarbco's failure to substantiate the deductions and upon its finding that they were "unreasonable and excessive." In the alternative, it determined that the expenditures were either for syndication or capital in nature and so not currently deductible.

C. Prior Proceedings

We note that this is not plaintiff's first run-in with the IRS. In 1991, plaintiff and his wife filed a similar action before this court, *Randell v. United States*, 91 Civ. 1948 (GLG), seeking to enjoin the collection of taxes for the tax year of 1984 and for an order directing that the assessments of added tax penalties for that year be abated. In that case, plaintiff alleged that the assessments were improper because they were based upon a disallowance of his distributive share of partnership losses which the Randells had not claimed (the losses were generated by a third partnership Redwood Associates). Plaintiff further alleged that because the assessments were not flow-through adjustments for partnership items, the IRS was required to mail him a notice of deficiency before it could make the assessments.

Both sides moved for summary judgment, but prior to our issuance of a decision, most of plaintiff's case was mooted when the IRS abated plaintiff's assessments. However, we granted plaintiff's motion for summary judgment as to his remaining claim for a court order barring the government from collecting any interest, ending plaintiff's back up withholding status, and granting plaintiff litigation costs.

Plaintiff also brought a related case in the tax court, *Randell v. Comm'r*, U.S. Tax Court Docket No. 9477-91 concerning penalties assessed for the 1984 tax year only for which the government had sent a notice of deficiency. Essentially plaintiff claimed that the penalties are improper based upon the same reasoning as argued in the 1991 district court case. The tax court held that no additions to tax were due from the Randells for the taxable year 1984 under the provisions of I.R.C. §§ 6651(a)(1), 66651(a)(2), 6653(a)(1), 6653(a)(2) and 6654 with respect to adjustments attributable to the Randells' investment in Redwood Associates.

ANALYSIS

Turning back to the case at hand, the government claims that it is entitled to summary judgment because 1) the dispute can only be resolved on the partnership level and the partnerships' failure to file petitions for readjustment precludes plaintiff's challenge to the tax assessments and 2) plaintiff's request for injunctive relief is barred by the Anti-Injunction Act.

Plaintiff argues that he may challenge the assessments because the government failed to send him a notice of deficiency and because the disallowance of the partnership deductions cannot properly be assessed to him as distributive income.

A. Failure to Contest the Partnership Adjustments

1. Tax Treatment of Partnership Items Act

The Tax Treatment of Partnership Items Act of 1982, Title IV of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), applies to partnerships with more than 10 partners. Prior to TEFRA, a partner's tax liability was determined on the individual partner level. In order to provide a uniform method of adjusting partnership items, TEFRA provides that "the tax treatment of any partnership item [will] be determined on the partnership level." *Maxwell v. Comm'r,* 87 T.C. 783, 787 (1986); *Roberts v. Comm'r,* 94 T.C. 8S3, 860 (1990). Regulations implementing TEFRA state that the term "partnership item" includes "[t]he partnership aggregate and each partner's share of ...[i]tems of income, gain, loss, deduction, or credit of the partnership." 26 C.F.R. § 301.6231(a)(3)-l(a)(i).

TEFRA provides a special procedure for requesting judicial review of administrative adjustments to partnership items. After making an adjustment determination, the IRS

must send an FPAA to the "tax matters partner." 26 U.S.C. §§ 6223(a)(1) 6223(d)(2). Within 60 days after the FPAA is sent to the tax matters partner, copies must also be sent to each notice partner. *Id.* at 6223(d)(2).

After an FPAA notice is mailed, the tax matters partner has 90 days to file a petition for readjustment in the Tax Court, the Court of Federal Claims, or an appropriate federal district court. *Id.* at § 6226(a). After the 90 days expire, any notice partner may file a petition for readjustment within the next 60 days. *Id.* at § 6226(b). If no timely action is brought within the 150 day window, the tax treatment of the partnership items described in the FPAA is conclusively established. *Genesis Oil & Gas. Ltd. v. Comm'r,* 93 T.C. 562, 565-66 (1989).

The government has submitted the declarations of IRS officials which state that proper notice was sent to GAT and Conarbco's tax matters and notice partners and that the partners failed to petition for readjustment within the proper period. Plaintiff does not contest this.[4] Therefore, we agree with the government that challenge to the IRS adjustments to the partnership items contained in the FPAAs is barred.

2. Notice of Deficiency Requirement

Regardless of the propriety of the IRS assessments against the partnerships, plaintiff claims that the government's assessments against him individually were improper because he was not provided proper notice, nor opportunity to challenge the assessments. As previously discussed, in January of 1993, the IRS sent bills to plaintiff which reflected assessments made against him as a result of

[4]We note that a copies of GAT and Conarbco's FPAAs were sent to plaintiff, as a notice partner, via certified mail and that Jon Edelman, GAT's tax partner, filed a petition for readjustment after the 90 day period expired.

the partnership adjustments. While an assessment is normally prima facie evidence of tax liability, *United States v. Voorhies,* 658 F.2d 710, 715 (9th Cir. 1981), the taxpayer may still bring a timely procedural challenge to an assessment. *Id.*

Plaintiff claims that his time to challenge the assessments has not expired because the government failed to send him a notice of deficiency pursuant to 26 U.S.C. § 6212(a). The tax code provides a taxpayer has 90 days (150 days if notice is addressed to someone outside the United States) after a notice of deficiency is mailed to him or her to file a petition with the Tax Court for redetermination of the deficiency. *Id.* at § 6213. Because plaintiff never received a notice under § 6212, he claims he is entitled to seek an injunction to prevent the IRS from collecting on its assessment.

The government argues that providing partners with an individual notice of deficiency for partnership items would be inconsistent with TEFRA procedures which are designed to allow the determination of partnership items at the partnership level. It contends that the FPAA notice provisions at the partnership level provide the same function as the notice of deficiency procedures.

In support of its position, the government asserts that its assessments against the plaintiff were computational adjustments to which §§ 6212(a) and 6213(a)'s notice procedures do not apply. The tax code provides that the deficiency procedures codified at §§ 6211-6216 "shall not apply to the assessment or collection of any computational adjustment." *Id.* at § 6230. "Computational adjustment" is defined as "the change in liability of a partner which properly

reflects the treatment under this subchapter of a partnership item." *Id.* at § 6231(a)(6)[5]

Further, section 6212 authorizes the IRS to send a notice of deficiency if it determines "a deficiency in respect of tax imposed by subtitles A or B...." The government asserts its assessments were imposed under section 6225 which is part of subtitle C. Section 6225 makes no reference to section 6212 and simply provides that no assessments of deficiency attributable to any partnership item may be made before the statutory 150 day period has run and the end of any Tax Court proceeding brought within the 150 days to challenge the assessment. *See Saso v. Comm'r,* 93 T.C. 730, 734 (1989) (dismissing portion of petition seeking redetermination of individual deficiency assessments made pursuant to section 6225 and based upon adjustments to partnership items made on the partnership level since partners failed to file timely petitions challenging issued FPAAs).

The government further argues that when plaintiff decided to treat partnership items differently then the partnership returns, he was required to notify the IRS of his inconsistent treatment. *Id.* at § 6222(b). Thus, the government contends that if plaintiff felt the distributive gains originally attributed to him on the K-ls were fraudulent,

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[5]An exception is also carved out for certain "affected items" (non-partnership items to the extent they are affected by partnership items) and items which have become nonpartnership items. 26 U.S.C. §§ 6230(2), 6231(a)(5). Thus, a notice of deficiency is required for additions to tax and penalties stemming from tax assessments to partners resulting from adjustments to partnership items, though no notice of deficiency is required for the tax assessments themselves. *See Saso v. Comm'r,* 93 T.C. 730 (holding that the IRS "complied with the statutory scheme of the partnership audit and litigation provisions" when it issued a notice of deficiency as determining additions to tax and additional interest) (1989); *N.C.F. Energy Partners v. Comm'r,* 89 T.C. 741, 744-46 (penalties or additions to tax are affected items requiring factual determinations on the individual partner level and are subject to deficiency procedures) (1986).

he was responsible for notifying the IRS that he intended to treat the alleged gains inconsistently with the partnerships. Similarly, the government argues that once additional income assessed to the partnerships as a result of the IRS administrative adjustments became final, plaintiff had a duty to either notify the IRS that he elected to treat the adjusted items differently or adjust his tax returns accordingly. Because the plaintiff failed to do either, the government argues that the IRS could properly assess a deficiency against the plaintiff without individual notice as a computational adjustment. *Id.* § 6222(c).

3. "Proper Treatment of a Partnership Item"

While plaintiff agrees that a notice of deficiency is not required for computational adjustments, he asserts that the proceedings at issue cannot properly be characterized as such. Plaintiff asserts that the IRS assessments against him do not properly reflect the treatment at the partnership ievel of the gains reported in his K-ls, and therefore do not meet the definition of a computational adjustment. He notes that the FPAAs state that the *gains,* losses, and interest expenses attributable to the T-bill and related transactions could not be recognized because the transactions were sham.[6] He argues that the gain items on his K-ls were the phony gains "generated" by the sham transactions. As a result, he argues, to the extent that the IRS assessments result from the gains reported on his K-ls, the assessments cannot be computational adjustments because they are not a proper

[6]We note although the FPAAs stated that the gains attributable to the T-bill transactions could not be recognized, no corresponding adjustments were made to the partnership returns to eliminate any previously reported gains. We also have no evidence as to how the IRS treated gains attributable to the T- bill transactions in any subsequent assessments made against individual partners.

reflection of the treatment of the gains on the partnership level.[7]

Crucial to plaintiff's argument is the assumption that the gains attributed to him in the K-ls were generated by the sham T-bill related transactions. The government argues that the FPAAs simply state that certain transactions were shams, not that all of the partnership transactions were and that the FPAAs provided alternative explanations for its adjustments relating to the disallowed interest payments and losses attributed to the T-bill transactions. Thus, it asserts that the gains originally attributed to the plaintiff in the partnership K-ls may have been from sources other than the T-bill transactions. Further, the government argues, even if the gains were attributable to the T- bill transactions, its alternative positions assert that the losses and interest payments should be disallowed even if the transactions were not shams. Thus, the government contends that it is not inconsistent for the IRS to disallow partnership losses and expenses while assessing tax on partnership gains attributed to plaintiff on the K-ls.

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[7]The government argues that, regardless of the subsequent adjustments made by the FPAAs, plaintiff was responsible for notifying the IRS that he was treating his distributive share of income reported by Conarbco on the 1985 and 1986 K-ls inconsistently with the partnership or requesting an administrative adjustment. 26 U.S.C. §§ 6222(b), 6227(a), 6228. It claims his failure to do so justified a computational adjustment under § 6222(c).

While we agree with the government that plaintiff's failure to notify the IRS that he had elected to treat the gains inconsistently with the K-ls would have justified a computational adjustment *prior to* the Conarbco FPAA, plaintiff's argument is that the FPAA contained a determination that the gains attributable to the T-bill transactions (which he asserts are the same gains listed on his K-ls) could not be recognized. Thus, his position is that his decision not to take the gains is consistent with the IRS's determination that the gains could not be recognized and that any deficiency assessment forcing him to take the gains is inconsistent with treatment of the gains on the partnership level.

On March 24, 1994, we received a letter from plaintiff's attorney stating that he had received the tax returns of the two partnerships and that "[n]one of the returns indicates any business for either partnership that would have generated income for the partnership other than the straddle transactions [the T-bill related transactions]." He asserts that Tax Court case law provides that when losses from sham straddle transactions are disallowed, gains from the same sham straddle transactions cannot be considered taxable income.

At present, we do not have the partnership tax return, and we have no way of determining whether or not the gains in plaintiff's K-1s were generated by the sham transactions. However, there may be merit to plaintiff's argument. Therefore, we do not think it proper to grant summary judgment as to the assessments attributable to the gains reported in the K-1s until it can be determined whether plaintiff's assertions are correct.

However, plaintiff's argument does not apply to the portion of the assessments based upon his distributive share of the disallowed partnership expenses. At the partnership level, the IRS determined that the deductions were improper and that the partnerships must take the deductions into income. Even though a portion of the disallowed deductions were interest deductions tied to the T-bill transactions, the IRS's assessments against Randell were consistent with its treatment of the deductions on the partnership level. Therefore we grant the government's motion for summary judgment as to the assessments attributable to the disallowed partnership deductions, but deny its motion as to the assessments attributable to the gains on plaintiff's K-1s.

B. The Anti-Injunction Act

The government's second argument is that this court lacks jurisdiction over plaintiff's request for injunctive relief. The Anti-Injunction Act, 26 U.S.C. § 7421(a) states that: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." However, plaintiff asserts that this suit falls within one of the Act's exceptions. Plaintiff argues that an injunction would be proper because the government has failed to send him a notice of deficiency pursuant to 26 U.S.C. § 2613 [sic]. Section § 2613 [sic] states:

> [e]xcept as otherwise provided in section 6851, 6852 or 6861, no assessment of deficiency in respect of any tax imposed by subtitle A, or B...and no levy or proceeding in court for its collection shall be made,...until [a notice of deficiency] has been mailed to the taxpayer... Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court.[8]

If plaintiff succeeds in establishing that the IRS assessments attributable to the gains on the K-ls were not computational adjustments, then the IRS may have been required to send plaintiff a notice of deficiency as to such assessments. As stated earlier, because factual issues remain

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[8]Although a notice of deficiency is not required for assessments imposed under subtitle C, which includes assessments of deficiency attributable to any partnership item, plaintiff claims because the IRS treated the gains inconsistently with their treatment on the partnership level the assessments against him can no longer properly be characterized as assessments attributable to a partnership item.

as to whether or not the gains on plaintiff's K-ls "resulted" from the sham transactions, we cannot determine whether the IRS assessments based upon the gains can properly be characterized as computational adjustments. Therefore, we cannot say, as a matter of law, that the Anti-Injunction Act bars plaintiff's claim to the extent that it seeks to enjoin collection of the IRS assessments based upon the gains in plaintiff's K-ls.

C. 1983 and 1986 Losses

The government argues that plaintiff's request for relief based upon the disallowance of the 1983 and 1986 distributive losses is moot because the IRS has abated those assessments and the corresponding interest. Plaintiff has conceded that these claims are moot.

In summary, we grant the government's motion and deny plaintiff's cross-motion for summary judgment as to the assessments of deficiency attributable to the disallowed partnership expenses. However, we deny both cross-motions for summary judgment as to the assessments of deficiency attributable to the gains on K-ls.

SO ORDERED.

GERARD L. GOETTEL
U.S.D.J.

Dated: White Plains, N.Y.
April 27, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACK RANDELL,	
Plaintiff,	
	93 Civ. 3979 (GLG)
-against-	MEMORANDUM
	DECISION
UNITED STATES OF AMERICA,	
Defendant.	

Plaintiff Jack Randell brought this action against the United States seeking to enjoin the government's efforts to collect taxes which he claims were illegally assessed and for an order directing that the assessments be abated. The parties cross-moved for summary judgment. On April 17, 1994, we issued a memorandum decision granting partial summary judgment to the government. The parties now cross-move for reargument.[1]

BACKGROUND

The IRS made assessments of deficiency against the plaintiff based upon his status as a partner in Government Arbitrage Trading Co. ("GAT") in 1983 and Conarbco in 1985, 1986 and 1987. The assessments were based in part upon adjustments to the partnership returns as a result of Internal Revenue Service ("IRS") audits.

[1]Plaintiff moves under Fed R. Civ. P. 60(b), and the Government moves under Civil Rule 3(j) of the Local Rules of the Southern District of New York. While relief from judgment under rule 60(b) would be improper because no final judgment has been entered, a motion under 3(j) is proper, and we proceed to decide these cross motions under 3(j).

In our prior decision, we noted that the tax treatment of partnership items is determined on the partnership level. *Maxwell v. Comm'r,* 87 T.C. 783, 787 (1986). Because the GAT and Conarbco partners failed to file timely petitions for readjustment, we held that all the partners, including the plaintiff, were barred from challenging adjustments contained in the Final Partnership Administrative Adjustments ("FPAAs"). *Randell v. United States,* No. 93 Civ. 3979, Mem. Dec. at 10 (S.D.N.Y. April 27, 1994). As such, we held that any assessments against plaintiff individually reflecting the treatment of partnership items as determined in the FPAAs were computational adjustments which did not require a notice of deficiency.

Applying our holding to the evidence that was before us, we distinguished between the two different sources of taxable income relied upon by the IRS. We granted summary judgment to the government as to the assessments resulting from the plaintiff's distributive share of additional partnership income attributable to partnership deductions which were disallowed in the FPAAs. However, we denied summary judgment to both parties as to assessments based upon plaintiff's distributive share of partnership income as attributed to him by the partnerships prior to the FPAAs.

The root of the disagreement between the parties, both at present and at the time of our original decision, lies in the interpretation of the determinations contained in the FPAAs. Although we had copies of the FPAAs before us when we issued our April 17 decision, we did not have copies of the partnership returns. Plaintiff has submitted copies of those returns with this motion. Because the FPAAs could not properly be understood without the returns which were not available when this motion was originally heard, we grant the parties' cross-motion to reargue.

ANALYSIS

A. Assessments Resulting from Additional Partnership Income Attributable to Disallowed Partnership Deductions

In our previous decision, we held that the IRS made a determination on the partnership level that deductions made by GAT and Conarbco were improper and that the two partnerships must take the deductions into income. *Randell v. United States,* Mem. Dec. at 16. We reached this conclusion based upon the language contained in the FPAAs.

Under the heading "DETAIL OF ADUSTMENTS TO INCOME," each of the FPAAs lists separate categories of disallowed deductions. To the right of each category is a dollar figure or the entry "0.00". The total of the disallowed deductions is written at the bottom of the column, and next to that amount is the explanation "ADJUSTMENTS TO ORDINARY INCOME".

When we reached our prior decision, we did not have copies of the partnership returns for the years in question and assumed that "adjustments to partnership income" on the FPAAs was synonymous with an increase of taxable partnership income. As a result, we granted summary judgment to the government as to the tax assessments based upon partnership "income" attributable to the disallowed deductions.

Plaintiff argues that, although the FPAAs disallowed certain partnership deductions and determined that the partnership income should be increased by a corresponding amount for each of the tax years at issue, they did not contain a determination that the partnerships actually had a corresponding increase in taxable income for those years. He contends that this becomes evident when the FPAAs are viewed in light of the partnership returns.

In 1983, GAT indicated that its total deductions exceeded its total income by $52,250,081. This was reported on its return as an "ordinary loss" of that amount.[2] The FPAA issued by the IRS disallowed the full amount of GAT's claimed deductions of $56,475,053. In light of the fact that GAT was reporting an ordinary loss for the year, it does not follow that the FPAA determination of "adjustments to ordinary income" of $56,475,053 is tantamount to a determination that the partnerships' taxable income should be increased by that amount. Indeed, the net effect of disallowing all of the claimed partnership deductions should be that the partnership's ordinary income will equal its undiminished total income.

In 1987, Conarbco reported that its total deductions exceeded its total income by (or an ordinary loss of) $1,795,461. The FPAA issued by the IRS disallowed all of Conarbco's claimed deductions and indicated that the total amount of the disallowed deductions constituted "adjustments to ordinary income." For the same reasons discussed above, we cannot conclude that Conarbco's FPAA contained a determination that the partnership's taxable income should be increased by the amount of the disallowed deductions.

However, in both 1985 and 1986, Conarbco reported that its total income exceeded its total deductions so that it had ordinary income of $8,842,600 and $8,597,583 respectively. The FPAA issued by the IRS subsequently disallowed all of Conarbco's claimed deductions for both years and indicated that the total of the disallowed deductions constituted "adjustments to income".

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[2]IRS form 1065 uses the term "ordinary income (loss)" to connote the difference between total income and total deductions. If the difference is positive it is ordinary income. If it is negative it is ordinary loss.

In light of the fact that Conarbco's returns reported that its total income exceeded its total deductions in 1985 and 1986, the net effect of the disallowed deductions in those years is a corresponding increase in Conarbco's ordinary income. As such, we hold that the FPAAs implied a determination of additional income to Conarbco in 1985 and 1986 equaling the amount of the disallowed deductions.

After reviewing the additional evidence submitted by the plaintiff, we vacate our prior decision to the extent that it granted partial summary judgment to the government as to the tax years 1983 and 1987. Because the FPAAs did not determine, nor imply, additional income to the partnerships equal to the amount of the disallowed deductions, we cannot conclude that the IRS assessments to the plaintiff based upon such additional income is a computational adjustment.

As such, we deny the government's motion as to assessments of deficiency attributable to additional partnership income equaling the disallowed partnership deductions for the tax years 1983 and 1987: Because the government has treated these items in a manner inconsistent with their treatment on the partnership level, the plaintiff is entitled to a notice of deficiency prior to any assessment of deficiency or levy or court proceeding for collection. Accordingly, we grant plaintiff's motion for summary judgment as to these assessments and order that these assessments be abated and collection activities be enjoined.[3]

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[3]We note that our decision to grant partial summary judgment to the plaintiff should not be interpreted to bar all future assessments against the plaintiff based upon the disallowed partnership deductions for the tax years 1983 and 1987. We simply hold that it was improper for the IRS to assess taxes and interests based upon the full amount of the disallowed deductions as a computational adjustment.

As for the 1985 and 1986 tax years, the adjustments to income indicated on the FPAAs when read in light of the partnership returns clearly indicate a determination of additional partnership income equal to the disallowed deductions. Thus, we abide by our earlier decision to grant partial summary judgment to the government as to the assessments of deficiency attributable to additional partnership income equaling the disallowed partnership deductions for the tax years 1985 and 1986.[4]

B. Assessments Attributable to Distributive Income as Reported on the K-ls

Both parties seek reargument of our decision to deny summary judgment as to the assessments of deficiency attributable to plaintiff's distributive share of partnership income as reported by Conarbco on its K-ls for 1985 and 1986. In 1985 and 1986, Conarbco reported ordinary income. As such, it filed K-ls reporting plaintiff's distributive share of income as $160,243 in 1985 and $155,712 in 1986.[5] Plaintiff did not file tax returns for those years and did not notify the IRS that he was treating the distributive income inconsistently with the partnership by not reporting the income as required by 26 U.S.C. § 6222(b).

As a Conarbco partner, plaintiff could have filed a request for administrative adjustment challenging the income reported by the partnership so long as he did so within three years after the date on which each return was filed. *Id.* at §

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[4]Plaintiff also argues that all the income reported by Conarbco in 1985 and 1986 was sham so that the partnership had no real income for those years. Because the partnership lacked real income, he contends that he cannot be taxed on additional income resulting from the disallowed deductions. We reject this argument for the reasons discussed infra in Part B of this Memorandum Decision.

[5]Although Conarbco also reported that plaintiff received distributive income in 1987, plaintiff reported the income on his individual tax return.

6227(a)(1). Plaintiff failed to do so. The IRS subsequently issued an FPAA indicating that it was disallowing all of Conarbco's claimed deductions for the two years at issue. It did not disallow any of its reported income. However, one of the IRS's alternate explanations for the disallowed deductions states that the gains, losses, and interest expenses attributable to the T-bill and related transactions could not be recognized because the transactions were sham.[6]

Plaintiff argues that the IRS assessments attributable to the distributive income reported on Conarbco's K-ls are not computational adjustments because they are not proper reflections of the treatment of the gains on the partnership level since the only possible source for the income is the T-bill transactions. While we did not adopt the plaintiff's reasoning, we denied summary judgment since we could not determine whether or not the income on the K-ls was attributable to the T-bill transactions without additional discovery.

Plaintiff argues that the Conarbco returns support his assertion that all or most of the income reported by the partnership in 1985 and 1986 was sham. He bases his assertion on the fact that Conarbco reported "securities" as its principal product or service. Plaintiff argues that in 1985 and 1986, Conarbco attributed a *de minimis* portion of its income to sources other than its principal product or service. Plaintiff asserts this indicates that Conarbco did not report income from any source other than the sham T-bill transactions.

The government argues that regardless of whether or not the distributive income reported on the K-ls can be traced to the T- bill transactions, where a taxpayer has not proven or

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[6]While plaintiff could have filed a notice of petition for readjustment after notice of the FPAA was mailed, plaintiff claims he did not do so because he agreed with the IRS explanation that the T-bill gains were sham.

disproved any alternate IRS explanations for adjustment, none of the IRS theories have binding effect. Thus, it asserts that there has never been any determination that the gains derived from the T- bill transactions are sham. Because plaintiff did not challenge the reported income at the partnership level, the government contends that the IRS can assess taxes based on his distributive share of the income as a computational adjustment.

In support of its position, the Government cites cases in which the IRS provided alternate theories for adjustments in notices of deficiency. The Government contends that such cases are analogous to the case at hand because an FPAA notice is the partnership equivalent of a notice of deficiency. *Clovis I v. Comm'r,* 88 T.C. 980, 982 (1987).

In *Malat v. Commissioner,* 302 F.2d 700, 706 (9th Cir. 1962), *cert. denied,* 371 U.S. 934 (1962), the Ninth Circuit reviewed the propriety of a tax court determination of tax deficiency in four related cases in which the tax court did not make findings of fact nor choose between the alternate theories of deficiency supplied by the IRS. The tax court determined a tax deficiency after the taxpayers moved for judgment on the pleadings *of a tax liability* and declined to submit any evidence in support or in opposition to any of the alternate theories proposed by the IRS.

The Ninth Circuit wrote:

> The objective of a proceeding before the Tax Court is not to expound legal theories or to make advisory findings or to render advisory opinions, but to arrive at a determination of how much tax, if any, the petitioner owes. When the petitioners concede that the tax determined by the Commissioner is owed, as they did in this case, then the fact-finding and law-expounding function of the Tax Court is at

> an end, and nothing remains to be done except to enter an order determining the amount of the deficiency.

Id. at 705.

The Ninth Circuit went on to state that it was the taxpayers' burden to prove that the IRS's assessments were in error. Because the taxpayers failed to do so, the Tax Court had no basis on which to make findings. Thus, the Ninth Circuit wrote:

> the decision in these cases can hardly be claimed by either party to be res judicata in other pending cases as to the correctness of either of the Commissioner's alternative theories, as distinguished from the amount of tax due, since there has been no determination by the Tax Court either as to the facts or the law, in view of the taxpayers' refusal to proceed with their cases.

Id. at 706.

Applying the reasoning set forth in *Malat,* the determinations of adjustment contained in the FPAA are final, but the alternate reasons supplied by the IRS have no binding effect. Consistent with our interpretation, we note, despite the language used in the IRS explanation which suggested that gains attributable to the T-bill transactions were sham, no corresponding adjustments were made on the partnership returns to eliminate any previously reported income.

As we stated earlier, the proper tax treatment of partnership items must be resolved on the partnership level. We do not have jurisdiction to determine the validity of the income reported by the partnerships. Our inquiry in this case

is limited to determining whether or not the IRS assessments against the plaintiff are proper computational adjustments. If the assessments correctly reflect the tax treatment of partnership items at the partnership level, our inquiry is satisfied.

Because Conarbco's FPAA did not contain a determination that gains reported by the partnership were sham, we must grant summary judgment to the Government as to the assessments made against the plaintiff based upon the distributive income reported on Conarbco's K-ls for 1985 and 1986.[7]

In summary, the parties' motion for reargument is granted. The government's motion for summary judgment as to the assessments of deficiency attributable to the plaintiff's share of distributive income as reported on Conarbco's K-ls for 1985 and 1986 is granted, and the plaintiff's cross motion is denied.

As for the assessments of deficiency attributable to plaintiff's distributive share of the disallowed partnership deductions, we see no reason to alter our grant of summary judgment to the Government as to the assessments of deficiency for the years 1985 and 1986. However, the plaintiff's motion for summary judgment is granted as to the assessments of deficiency attributable to the plaintiff's distributive share of disallowed partnership deductions for the years 1983 and 1987. The Government's motion as to those assessments is denied.

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[7]Because the propriety of partnership income must be determined on the partnership level, we do not have jurisdiction to consider whether or not the income "generated" by the T-bill transactions was actually sham. As such, our decision does not reach the issue of whether or not the distributive income attributed to the plaintiff was fraudulent.

Accordingly, we order that the assessments of deficiency attributable to plaintiff's distributive share of the disallowed partnership deductions for the years 1983 and 1987 be abated and that all collections activities be enjoined.

The parties shall settle a judgment.

SO ORDERED.

GERARD L. GOETTEL
U.S.D.J.

Dated: White Plains, N.Y.
June 30, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACK RANDELL,	:	
Plaintiff,	:	
	:	93 Civ. 3979 (GLG)
-against-	:	NUNC PRO TUNC
	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

On June 30, 1994, we issued a memorandum decision granting the parties' motion for reargument of a previous memorandum decision issued on April 28, 1994 and granted summary judgment to the government in part and to the plaintiff in part.

In the June 30 memorandum, we granted summary judgment to the plaintiff for the tax years 1983 and 1987. Our decision to grant partial summary judgment to the plaintiff was based upon a mistaken impression that the IRS computed its 1983 and 1987 assessments to the plaintiff by treating the full amount of disallowed partnership deductions as taxable income and accordingly taxed plaintiff on his distributive partnership share. Prior to submitting a judgment, the government pointed out that this is not the case. After scrutinizing the applicable tax returns, we agree.

In 1983, Government Arbitrage Trading Co. ("GAT") reported its total income as $4,224,972 and its total deductions as $56,475,053 resulting in a total loss of $52,250,081. In October of 1991, the IRS issued an FPAA disallowing, the full $56,475,053 in claimed deductions as well as certain of GAT' s claimed short and long term capital losses. In January of 1993, the IRS sent plaintiff a bill and a

Form 4549-A explaining resulting adjustments made to his 1983 tax return. The IRS adjustment stated that a $889,709 adjustment had been made to plaintiff's income. As a result of the $889,709 adjustment to his income, the IRS assessed plaintiff $444,855 in additional taxes and $848,871.76 in interest.

In November of 1993, the IRS determined that the plaintiff should not be taxed on his distributive share of GAT's disallowed ordinary and long and short term capital losses. As a result, the IRS issued plaintiff an abatement of $420,145 in taxes and $796,442.34 in interest for the 1983 tax year reflecting its determination that plaintiff should not be taxed on $823,292 of the adjustment to his income. Thus, after the abatement, plaintiff was only left with the portion of tax attributable to $66,417 assessed as additional income.

When we wrote the June 30 memorandum decision, we had thought that the remaining $66,417 adjustment to plaintiff's income represented plaintiff's distributive share of GAT's disallowed partnership deductions of $56,475,053. However, the government has pointed out that is not the case. Upon closer examination of the relevant tax returns and adjustments, we agree.

In 1983, plaintiff had a 1.572% interest in GAT. As we stated, in the June 30 memorandum decision, the proper tax treatment resulting from the FPAAs is that plaintiff should only be taxed on his distributive share of GAT's undiminished income. $66,417 correctly represents 1.572% of $4,224,972, GAT's undiminished total income for 1983.

Similarly for 1987, plaintiff was taxed on $140,047 which represents his 1.798% share of Conarbco's reported $7,789,054 total income undiminished by the disallowed deductions.[1]

In light of the factual misstatement contained in our June 30 memorandum, we amend it *nunc pro tunc* and grant summary judgment to the government in full. The clerk shall enter judgment.

SO ORDERED.

GERARD L. GOETTEL
U.S.D.J.

Dated: White Plains, N.Y.
August 2, 1994

[1]Because plaintiff filed a tax return in 1987 which reported $29,526 in income attributable to Conarbco, he was actually only assessed additional taxes on $110,521 in additional income.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACK RANDELL,	:
Plaintiff,	:
	: 93 CIVIL 3979 (GLG)
-against-	: JUDGMENT
	:
UNITED STATES OF AMERICA,	:
Defendant.	:

Whereas the above entitled action having been assigned to the Honorable Gerard L Goettel, U.S.D.J., and the Court thereafter on June 30, 1994, having handed down its memorandum decision and thereafter on August 2, 1994, having handed down its nunc pro tunc order granting the defendants' motion for summary judgment and dismissing the complaint, it is,

ORDERED ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed nunc pro tunc.

Dated: White Plains, New York
August 3, 1994

James M. Parkison
Clerk

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT UNITED STATES COURT HOUSE
48 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26 day of February one thousand nine hundred and six .

Present:

Hon. Thomas J. Meskill
Hon. Richard J. Cardamone
Hon. Frank X. Altimari
CIRCUIT JUDGES,

94-6220 *Randell v. USA*

A petition for rehearing having been filed herein by Jack Randell, Plaintiff-Appellant,
Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

GEORGE LANGE III, Clerk

Beth J. Meador,
Administrative Attorney

pethrg_frm

p/o/CD

EXPLANATION OF ADJUSTMENTS

1. & 6.) A. It is determined that the losses, gains and/or interest expense claimed by you in 1983 with respect to your T-bill, repurchase agreement, reverse repurchase agreement and other similar transactions cannot be recognized because Government Arbitrage Trading Co. has not established that the losses, gains and/or interest expense in fact occurred or occurred in the manner claimed.

B. It is further determined that the T-bill, repurchase agreement, reverse repurchase agreement and other similar transactions, were not bona fide economic transaction, but rather were pre-arranged, manipulated, fixed, rigged or risk-free transaction that generated artificial tax losses, gains and/or interest expenses, and were either sham or lack the substance necessary for recognition for Federal income tax purposes. Additionally, no genuine losses, gains, and/or interest expense occurred or was incurred.

2. - 5.) It is determined that the claimed deductions are disallowed because the partnership has not substantiated them or shown that they were incurred, or that they constitute ordinary and necessary business expenses. In addition, the amounts claimed are unreasonable and excessive.

If it is established that these deductions were in fact incurred, then it is determined that such expenditures are either for syndication or are capital in nature with an indeterminate useful life and are therefore neither currently deductible nor amortizable.

ALTERNATIVE POSITIONS

1. & 6.) Alternatively, if it is found that the alleged transactions were not shams and had substance for federal income tax purposes, then Government Aribtrage Trading Co. is not entitled to the deduction because it has not shown that the partners or the partnership was at risk pursuant to the provisions of section 465 of the Internal Revenue Code.

1. & 6.) Alternatively, if it is found that the alleged transactions were not shams, had substance for federal income tax purposes, and the partners or the partnership was "at risk" under I.R.C. Section 465, then Government Arbitrage Trading Co. is not entitled to the deduction because it is determined that the transactions were, in substance, forward contracts for the purchase of Government securities at future dates by the partnership or its agents.

1. & 6.) Alternatively, if it is found that the alleged transactions were not shams and had substance for federal income tax purposes, then Government Arbitrage Trading Co. is not entitled to the claimed losses because it has not shown that the partners or the partnership entered into the transactions primarily for profit.

EXPLANATION OF ADJUSTMENTS

1. & 6.) A. It is determined that the losses, gains and/or interest expense claimed by you in 1985, 1986 and 1987 with respect to your T-bill, repurchase agreement, reverse repurchase agreement and other similar transactions cannot be recognized because Conarbco has not established that the losses, gains and/or interest expenses in fact occurred or occurred in the manner claimed.

B. It is further determined that the T-bill, repurchase agreement, reverse repurchase agreement and other similar transactions, were not bona fide economic transactions, but rather were pre-arranged, manipulated, fixed, rigged or risk-free transactions that generated artificial tax losses, gains and/or interest expenses, and were either shams or lack the substance necessary for recognition for Federal income tax purposes. Additionally, no genuine losses, gains, and/or interest expense occurred or was incurred.

2. - 5.) It is determined that the claimed deductions are disallowed because the partnership has not substantiated them or shown that they were incurred, or that they constitute ordinary and necessary business expenses. In addition, the amounts claimed are unreasonable and excessive.

If it is established that these deductions were in fact incurred, then it is determined that such expenditures are either for syndicatioon or are capital in nature with an indeterminate useful life and are therefore neither currently deductible nor amortizable.

ALTERNATIVE POSITIONS

1. & 6.) Alternatively, if it is found that the alleged transactions were not shams and had substance for federal income tax purposes, then Conarbco is not entitled to the deduction because it has not shown that the partners or the partnership was "at risk" pursuant to the provisions of section 465 of the Internal Revenue Code.

1. & 6.) Alternatively, if it is found that the alleged transactions were not shams, had substance for federal income tax purposes, and the partners or the partnership was "at risk" under I.R.C. Section 465, then Conarbco is not entitled to the deduction because it is determined that the transactions were, in substance, forward contracts for the purchase of Government securities at future dates by the partnership or its agents.

1. & 6.) Alternatively, if it is found that the alleged transactions were not shams and had substance for federal income tax purposes, then Conarbco is not entitled to the claimed losses because it has not shown that the partners or the partnership entered into the transactions primarily for profit.

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT
UNITED STATES COURTHOUS
40 FOLEY SQUARE - ROOM 1702
NEW YORK. N.Y. 10007

GEORGE LANGE
CLERK

GENERAL INFORMATION
(212) 791-0103

April 10, 1995

Jared J. Scharf, Esq.
11 Martine Avenue
White Plains, NY 10606

Deborah Y. Yeoh, Esq.
U.S. Attorney's Office
Civil Division, Appellate Unit
Southern District of New York
100 Church Street
New York, NY 10007

Re: Randell v. U.S.A., 94-6220

Dear Counsel:

The panel that heard the above appeal requested the government to provide some evidence from the I.R.S. as to whether Mr. Randell was singled out as the only partner who was taxed upon his share of gross partnership gains. The government has sent a letter stating that the "IRS has confirmed that all of the partners who did not settle with the IRS, were assessed of their full distributive share of the partnerships' reported income after the FPAA adjustments become final."

The panel finds the government's letter unsatisfactory as it does not reveal who at the IRS confirmed this information. The panel requests the government to produce an affidavit of the person at the IRS attesting to the information included in the earlier letter.

Very truly yours,

GEORGE LANGE III, Clerk

GLIII/yb
cc: Panel

U.S. Department of Justice

United States Attorney
Southern District of New York

100 Church Street
New York, New York 10007
May 2, 1995

BY HAND

Hon. Thomas. J. Meskill
Hon. Richard J. Cardamone
Hon. Frank X. Altimari
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Randell v. United States, Dkt. No. 94-6220

To the Members of the Panel:

Pursuant to the April 10, 1995 letter of the Hon. George Lange III, Clerk, please find enclosed the Affidavit of Karen Montpetit attesting to the information contained in the government's March 23, 1995 letter to this Court.

Thank you for your consideration of this matter.

Respectfully,

MARY JO WHITE
United States Attorney
By: NANCY G. MILBURN
Assistant United States Attorney
Tel. No.: (212) 385-6351

cc: Jared Scharf, Esq. (by facsimile)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

JACK RANDELL,	:	
Plaintiff-Appellant	:	
	:	
-v.-	:	AFFIDAVIT OF
	:	KAREN
UNITED STATES OF AMERICA,	:	MONTPETIT
Defendants-Appelles.	:	

----------x

KAREN MONTPETIT, being duly sworn, deposes and says as follows:

1. I am a duly commissioned TEFRA Coordinator employed by the Internal Revenue Service (the "IRS") at the Brookhaven Service Center in Holtsville, New York.

2. I submit this Affidavit pursuant to the letter of the Hon. George Lange III, Clerk of the United States Court of Appeals for the Second Circuit, dated April 10, 1995.

3. The information set forth in this Affidavit is based upon information contained in the books and records of the IRS.

4. I have reviewed the letter of Assistant United States Attorney Deborah Y. Yeoh dated March 23, 1995 and find the information contained therein to be true and accurate.

5. I have been informed that, at the conclusion of oral argument of the above-captioned appeal, this court directed the Government to determine, if possible, how many of the 156 partners in Government Arbitrage Trading Co. ("GATC") for 1983 and of the 132 partners in Conarbco for 1985, 1986 and 1987, who did not enter into settlement agreements with the IRS, were assessed with their distributive share of the partnerships' reported

income after the IRS' notices of final partnership administrative adjustments (the "FPAA") became final.

6. All of the partners who did not settle with the IRS, were assessed with their full distributive share of the partnerships' reported income after the FPAA adjustments became final. More specifically, twenty-two GATC partners (including plaintiff) for 1983, and twenty-one Conarbco partners (including plaintiff) for 1985, 1986 and 1987, did not settle with the IRS and were assessed with their distributive share of partnership income.

KAREN MONTPETIT

Sworn to before me on
April 30, 1995
Margaret Staltare
Notary Public
(stamped)

U.S. Department of Justice

United States Attorney
Southern District of New York

100 Church Street
New York, New York 10007

August 21, 1995

BY HAND

Hon. George Lange III
Clerk of the Court
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square, Room 1702
New York, New York 10007

Re: Randell v. United States, Dkt. No. 94-6220

Dear Mr. Lange:

It has recently come to the attention of this office that certain information in a letter from this Office to the Court dates March 23, 1995 and in an Affidavit of Karen Montpetit dated April 30, 1995, requires clarification and correction. Accordingly, the government respectfully submits the enclosed original letter and Supplemental Affidavit of Karen Montpetit dated August 17, 1995 for filing (along with one copy), and three additional copies of each for distribution to the panel (Hon. Thomas J. Meskill, Hon. Richard J. Cadamone and Hon. Frank X. Altimari).

Thank you for your attention in this matter.

Respectfully,

MARY JO WHITE
United States Attorney
By: DEBORAH Y. YEOH
Assistant United States Attorney
Tel. No.: (212) 385-6365

(enclosures)

cc: Jared Scharf, Esq. (enclosures) (by facsimile)

U.S. Department of Justice

United States Attorney
Southern District of New York

100 Church Street
New York, New York 10007

August 21, 1995

BY HAND

Hon. Thomas. J. Meskill
Hon. Richard J. Cardamone
Hon. Frank X. Altimari
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Randell v. United States, Dkt. No. 94-6220

To the Members of the Panel:

During oral argument in the above-referenced appeal, plaintiff claimed that he had been singled out by the Internal Revenue Service (the "IRS") for disparate treatment, and submitted a letter to the court stating that the Government "know(s) that Randell is the only partner who is being taxed upon his share of gross partnership gains." (P1. Ltr dated Mar. 13, 1995) (emphasis in original). At the conclusion of oral argument, the Court directed that the Government report within ten days the IRS's determination, if one could be made, as to how many of the partners in Government Arbitrage Trading Co. ("GATC") for 1983, and in Conarbco for 1985, 1986 and 1987, did not enter into settlement

agreements with the IRS and were — like plaintiff — assessed with their distributive share of the partnerships' reported income after the IRS's notices of final partnership administrative adjustments (the "FPAA") became final.

In response to the Court's inquiry, the Government submitted a letter dated March 23, 1995, and an affidavit of Karen Montpetit dated April 30, 1995 (the "April 30, 1995 Affidavit"), which attests to the information contained in the Government's letter. It has recently come to the attention of this Office that in an effort to provide a response to this Court, the IRS made certain incorrect assumptions based on the information that was available to it at that time.' Thus, the Government respectfully submits herewith the Supplemental Affidavit of Karen Montpetit dated August 17, 1995 (the "Supplemental Affidavit"), which clarifies and corrects certain information in the April 30, 1995 Affidavit and the Government's letter. The Government notes that the information in the supplemental Affidavit does not affect the relevant analysis in this case that contrary to plaintiff's contention, plaintiff was not the only partner who was assessed his distributive share of partnership income.

The government apologizes to the Court and to plaintiff for any inconvenience it may have caused.

Respectfully,

MARY JO WHITE
United States Attorney
By: DEBORAH Y. YEOH
Assistant United States Attorney
Tel. No.: (212) 385-6365

(enclosures)

cc: Jared Scharf, Esq. (with enclosures) (by facsimile)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JACK RANDELL,	:	
Plaintiff-Appellant	:	
	:	SUPPLEMENTAL
-v.-	:	AFFIDAVIT OF
	:	KAREN
UNITED STATES OF AMERICA,	:	MONTPETIT
Defendants-Appelles.	:	

KAREN MONTPETIT, being duly sworn, deposes and says as follows:

1. I am a duly commissioned Technical Unit Manager employed by the Internal Revenue Service (the "IRS") at the Brookhaven Service Center in Holtsville, New York. I previously was the TEFRA Coordinator at the Brookhaven Service Center.

2. This affidavit supplements my previous affidavit dated April 30, 1995 (the "April 30, 1995 affidavit"). I make this affidavit based on my review of IRS records available to me at this time and to the best of my knowledge and belief.

3. The April 30 1995 Affidavit was prepared to attest to the Government's letter dated March 23, 1995 to the Court. The Government submitted that letter in response to this Court's request at oral argument that the Government report within ten days the IRS's determination, if one could be made, as to how many of the partners in Government Arbitrage Trading Co. ("GATC") for 1983, and in Conarbco for 1985, 1986 and 1987, did not enter into settlement agreements with the IRS and were — like plaintiff — assessed with their distributive share of the partnerships' reported income

after the IRS's notices of final partnership administrative adjustments (the "FPAA") became final. I prepared a response, based upon information contained in IRS records that were available at the time and based upon certain assumptions that I wish to clarify and correct herein.

4. In the April 30, 1995 Affidavit, I set forth the number of GATC and Conarbco partners who did not settle with the IRS and who were assessed with their ditributive share of partnership income after the FPAAs became final. In particular, I indicated that twenty-two GATC partners (including plantiff) for 1983, and twenty-one Conarbco partners (including plaintiff) for 1985, 1986 and 1987, did not settle with the IRS and were assessed with their distributive share of partnership income. I based this statement on my review of certified mailing lists of partners who were issued FPAAs and on other internal IRS documents that track each partner and the disposition of each partner's case. These documents indicated that twenty-two GATC pertners and twenty-one Conarbco partners defaulted by not timely petitioning the tax court for a redetermination of the FPAA adjustments. Following a default, the IRS has one year in which to assess each partner's distributive share pursuant to the FPAA. When I reviewed the douments in connection with my April 30, 1995 Affidavit, I incorrectly assumed that the defaulted partners had all been assessed.

5. I recently learned that one individual, a partner in GATC, neither settled nor was assessed due to that individual's having filed for bankruptcy.

6. I thereafter reviewed additional documents and determined that fourteen of the twenty-two GATC partners and nine of the twenty-one Conarbco partners who had defaulted were "pass-thru partners." A "pass-

thru partner" is a partnership, estate, trust, S-corporation, nominee or other similar person through which other persons , known as "indirect partners," hold an interest in the partnership. Because IRS assessments are made against indirect partners who are either individuals or taxable entities (i.e., other than a partnership or S-corporation), but not against pass-thru partners, the defaulting partners who were pass-thru partners were not assessed.

7. To verify whether each indirect partner was assessed, the IRS would have to expend a tremendous amount of resources in determining the identity and tax treatment of each indirrect partner. Such verification would necessitate retrieval and analysis of thousands of documents located in Service Centers throughout the country. First, all of the pass-thru partners' tax returns would have to be retrieved to identify the indirect partners. This identification would continue at the next level if any of the indirect partners in turn were themselves pass-thru partners. Following identification of the ultimate indirect partners, documents for all of the indirect partners would need to be obtained and analyzed to determine precisely what happened to each partner as a result of the default. This task would require an enormous amount of the IRS's resources, and in the end, if all of the documents were not available, a complete answer could not be determined.

8. I have also reviewed additional documents relating to the eight GATC and twelve Conarbco individual partners (including Randell) who defaulted. The available documentation relating to three GATC and seven Conarbco individual partners is not clear as to whether they were assessed pursuant to the FPAAs and again, clarification would require a substantial amount of the IRS's resources to retrieve and analyze additional

documents located in Service Centers throughout the United States.

9. However, documentation that is now available to me demonstrates that of the twenty-two GATC and twenty-one Conarbco partners who defaulted (including Randell), the IRS adjusted the returns of four GATC and four Conarbco individual partners (other than Randell) to reflect assessments pursuant to the FPAAs. Thus, Randell was not the only partner who was assessed pursuant to an FPAA.

KAREN MONTPETIT

Sworn to before me on
August 17, 1995
Marie M. Barrett
Notary Public
(stamped)